

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ZENIMAX MEDIA INC. and ID) 3:14-CV-1849-K
SOFTWARE LLC)
Plaintiffs,)
)
VS.)
) DALLAS, TEXAS
)
OCULUS VR, LLC, PALMER)
LUCKEY, FACEBOOK, INC.,)
BRENDAN IRIBE and JOHN)
CARMACK,)
Defendants.) January 26, 2017

TRANSCRIPT OF JURY TRIAL, VOLUME 19
BEFORE THE HONORABLE ED KINKEADE
UNITED STATES DISTRICT JUDGE

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1 JURY TRIAL - JANUARY 26, 2017

2 P R O C E E D I N G S

3 THE COURT: Mercy, you know the charge is too thick
4 when even our big stapler won't go through it. It wouldn't go
5 through it, but it's okay.

6 All right. Let's get -- we're down to the charge.
7 Y'all have conditionally closed. Let's make sure that we are
8 now really closed and that I deal with all of those issues at
9 this point that you might -- are still there.

10 I think I have resolved this issue with regard to the
11 financial statements from ZeniMax with regard to that.

12 Do you understand what I told you, Mr. Sammi, about
13 that?

14 MR. SAMMI: Yes, sir.

15 THE COURT: And you're going to follow my instruction
16 regarding that?

17 MR. SAMMI: I will, sir.

18 THE COURT: Okay. And you understand that issue,
19 too?

20 MS. WILKINSON: I do, Your Honor. I would like to
21 put it on the record whenever you want me to that --

22 THE COURT: Put whatever you want to put in the
23 record.

24 MS. WILKINSON: Yes, I understand your instruction.

25 THE COURT: No, I mean put anything else on the

1 record you want too.

2 MS. WILKINSON: Your Honor, as you know, we asked
3 Mr. Altman under oath about the financial value of his company
4 and he claimed that there were documents showing that the
5 valuation of his company was anywhere between \$4 and 8 billion,
6 and despite a court order and a motion to compel to produce
7 financial documents on that valuation, they haven't done so.
8 You ordered them to do so.

9 And only at 6:30 this morning did we get about 60
10 pages of heavily redacted documents including things that were
11 all created very recently, some private placement which isn't
12 actually -- it just shows it's a proposal for a billion dollar
13 valuation.

14 And then there is an email from Mr. Vlatko Andonov,
15 who works directly for Mr. Altman, and it was actually written
16 while Mr. Altman was here in the courtroom on January 18, 2017,
17 purporting to say that some other company wanted to purchase --
18 had called. There is no documentation of the call. He's just
19 saying to Mr. Altman that some other company wanted to call and
20 that Mr. Andonov, who is at ZeniMax, gave him guidance about \$8
21 to 10 billion, not that anyone else said that.

22 And then a stock purchase agreement that is heavily
23 redacted and an investor -- investment banking debt from a
24 company called Cyndx, C-Y-N-D-X, which gives some purported
25 valuations, although when we looked it up this morning,

1 Mr. Altman himself is on the board of Cyndx.

2 So I did not have sufficient time to review these,
3 talk to any financial experts, so that I could cross-examine
4 him, and I would like him to be precluded, Mr. Sammi, from
5 being precluded to argue about the value but also the jury to
6 be instructed that they failed to produce the documents in a
7 timely basis.

8 THE COURT: I'm not going to instruct the jury that,
9 but I am going to preclude him from arguing that they had
10 sufficient funds and could have, would have, should have
11 invested in VR other than what they just normally were doing
12 and whatever evidence there was with regard to that in the
13 normal course of business.

14 Does that cover the issues you were most concerned
15 about?

16 MS. WILKINSON: Yes. That they can't --

17 MR. SAMMI: I think --

18 THE COURT: Stop, stop.

19 MS. WILKINSON: That they can't say that when I say
20 they didn't have sufficient money to make the kind of
21 investment was necessary like Facebook did, you know,
22 \$5 billion, that they can't get up and say, oh, yeah, our
23 company was worth it, we could have done it, we just didn't.
24 They can't say that, they can't respond, because they don't
25 have any evidence in the record other than the evidence he used

1 producing the documentation that their company is actually
2 worth that.

3 So there is two ways I want to argue the valuation.
4 One is that they -- they never would have had the ability nor
5 did they want to invest in VR and have what it takes to make
6 those investments in VR, but also that it's absurd to suggest
7 they had a \$2 billion asset when they are a company that's, you
8 know, their stock equity shows they are less than a billion
9 dollar company and they had a \$2 billion asset that they didn't
10 take care of, they didn't, you know, confront Oculus when
11 Oculus sold its product out into the public, and that makes no
12 sense. It would be more valuable than the entire company.

13 THE COURT: Okay.

14 MR. HEMR: Your Honor, if I may respond briefly to
15 that just so I can put some things on the record and also to
16 respond to the last thing Ms. Wilkinson said.

17 The first thing, we disagree these were outside --
18 that these were within the scope of the prior discovery
19 requests and the Court's prior order.

20 Mr. Altman was deposed in April of 2016. He was
21 never asked about these issues. We never received any further
22 follow up from Defendants' counsel about these issues.

23 He was put up on the stand on what I believe was
24 January 20. All of the documents we produced -- and we
25 produced about 120 pages of documents -- addressed -- they were

1 all dated prior to Mr. Altman's appearance on the stand. The
2 email that she referenced was from January 18, two days before
3 Mr. Altman took the stand, and, of course, Mr. Altman had no
4 knowledge of what Ms. Wilkinon was going to ask him about.

5 I would further say that with regard to the last
6 point about whether the company was -- the market value of the
7 company as Ms. Wilkinon has argued it, that, you know, for --
8 Mr. Altman's understanding is what his understanding is. It
9 was accurate. It was confirmed by the documents.

10 And to say, well, actually, this is a couple hundred
11 million dollar company when there is no evidence in the record,
12 there is certainly no, you know -- nothing has been proffered
13 in terms of expert testimony on that, so to suggest that that's
14 what the record establishes, we disagree with that.

15 With regard to Your Honor's point about investment,
16 we understand that instruction, and, you know, we will abide by
17 it.

18 THE COURT: Yeah. How you going to make an
19 argument -- where was the evidence as to what you're going to
20 say what the value was?

21 I'm not letting them argue the other way. Help me.

22 MS. WILKINSON: The testimony I wrote on the board of
23 what he said, Your Honor. I wrote it down when he said it. I
24 have two on here. Sorry.

25 THE COURT: Oh, sorry.

1 MS. WILKINSON: I wanted to cover that up while
2 Mr. Sammi speaks so he doesn't have the jury looking at it.

3 THE COURT: We'll fix it.

4 MS. WILKINSON: This one. When we were comparing and
5 he said the shareholder value was 788 and it had no market
6 value, and he said this is what he said, and he has no
7 documentation for that, which is true. This is all from his
8 testimony.

9 THE COURT: You're going to argue that he said 4 to
10 8?

11 MS. WILKINSON: Yeah, but he hasn't provided any
12 support for that, there is nothing in the record for that, and
13 this is the financials that he gave us. There is no market
14 value, this is no evidence, and then we have his own expert
15 saying they didn't value it. We have the expert saying there
16 is no evidence that they were ready to spend \$3 billion on VR.

17 THE COURT: And how do you want to respond to that,
18 Mr. Sammi?

19 MR. SAMMI: Your Honor, there's ample evidence in the
20 record. For example, not based on a valuation number but
21 evidence in the record from Mr. Altman himself that ZeniMax
22 puts out and its studios put out games that are AAA blockbuster
23 games that make billions of dollars.

24 This should not be rebutted in argument that
25 ZeniMax is a company that can't afford any given dollar value

1 number.

2 That's different from saying that we would come in
3 and argue that ZeniMax has a valuation of X or Y, but
4 Mr. Altman's testimony is supported.

5 MS. WILKINSON: Did he say in the record that his
6 games made billions of dollars? I don't remember that, so I
7 would like to check that, because he may have, Your Honor. I
8 mean, I'm not -- I would just like to check.

9 Can someone look and check?

10 MR. SAMMI: We can check that. But --

11 THE COURT: So help me understand what your
12 argument -- what you want to argue. I don't want to cut you
13 off in front of the jury.

14 MR. SAMMI: Sure. We would want to argue that
15 ZeniMax has a history of creating the world's best leading
16 video games, and that is not --

17 THE COURT: You can argue that.

18 MR. SAMMI: And that it is not an inexpensive
19 proposition, and we invest millions and millions of dollars,
20 hundreds of millions of dollars in research and development to
21 develop our video games.

22 Mr. Carmack tweeted the entire genre of first-person
23 shooter games is an attempt at virtual reality. All of the
24 research and development that ZeniMax has made through the
25 first-person genre games that we have gone through, Doom, Quake

1 et cetera, et cetera, are all directed towards virtual reality,
2 as said by their own Defendant.

3 To be precluded from arguing all this work that is
4 done by this company is all aimed as investment into VR --

5 MS. WILKINSON: Judge, I don't have any problem with
6 anything he said.

7 THE COURT: I didn't hear anything there that --

8 MS. WILKINSON: If it's just the billions of dollars
9 or hundreds of millions, if that's in the record, other than
10 that, he can say all that.

11 THE COURT: Yeah, I didn't see any problem there.

12 MR. SAMMI: Okay.

13 THE COURT: Okay. Do you understand where the
14 problem is going to be?

15 MR. SAMMI: Yeah. I just want to be clear what the
16 problem is going to be so I don't run afoul.

17 THE COURT: Tell me what you think.

18 MR. SAMMI: I understand that in response to an
19 argument that ZeniMax cannot say that it is a company that
20 was -- would be able to spend \$3 billion.

21 THE COURT: Yeah, you can't say that.

22 MR. SAMMI: Okay.

23 THE COURT: I'm not going to let you say it because
24 you didn't produce the records until the very last minute, and
25 it is not really that clear. There are some things in there,

1 but I ordered that done way before now, and I'm not blaming
2 Mr. Hemr, but he got it at 6:30 this morning.

3 what that tells me is Mr. Hemr was up all night, and
4 I appreciate him working hard, but that's just too little too
5 late. Okay.

6 MR. SAMMI: Your Honor, just one point of
7 clarification.

8 The argument that I think counsel made during -- or
9 the questions counsel was asking of Mr. Altman on the stand was
10 making a disparity between, for example, Facebook has
11 \$350 billion in marketing capital and then on their balance
12 sheet they have 50 billion. But are they allowed to argue that
13 ZeniMax, based on our financial statements --

14 THE COURT: That's a public company. You had all
15 kinds of access to their records, that sort of thing. This is
16 a private company, and you-all didn't produced all that. I'm
17 sorry. That's the way it is.

18 MR. SAMMI: One final point.

19 THE COURT: Yes, sir.

20 MR. SAMMI: Am I allowed to argue the fact that there
21 is nothing untowards with not putting value on your financials?
22 We did have that testimony about the Facebook's market cap.

23 THE COURT: What do you want to say now? I'm not
24 sure.

25 MR. SAMMI: Sure.

1 That if there is a suggestion or argument that there
2 is something untoward about what ZeniMax is doing if it hasn't
3 put its -- in a shareholder value line in its financial
4 statements billions of dollars, that's -- that's not unusual.

5 Facebook itself has a market cap of 350 billion, and
6 yet on its financials it only shows 5000 -- 50 billion in
7 shareholder value.

8 This is the example of Mr. Dan Jackson on the stand
9 talking about Coca-Cola. Coca-Cola doesn't value its trade
10 secrets on its balance sheet. GAAP principles actually don't
11 allow it. It's one of the most valuable trade secrets in the
12 world.

13 The problem is we can't leave this jury with the
14 impression that based upon a financial report, generally
15 accepted accounting principles, that there is something wrong
16 going on here that ZeniMax didn't put it on the books.

17 MS. WILKINSON: Your Honor, I don't have any problem
18 with that generally. I'm not arguing that. I'm arguing that
19 they put no evidence in the record, period, whether it's in
20 their financials or anywhere else to show that they could -- or
21 would have --

22 THE COURT: You mean to back up what Mr. Altman said.

23 MS. WILKINSON: He said, and he's self-serving, he
24 has a financial interest, and he didn't produce anything.

25 THE COURT: And you can say he said.

1 MS. WILKINSON: Right.

2 THE COURT: He said --

3 MR. SAMMI: I can say he said --

4 THE COURT: He said this, this.

5 MR. SAMMI: That ZeniMax is worth 4 to 8 billion
6 dollars.

7 THE COURT: I mean, obviously. That's in evidence.

8 MR. SAMMI: Great.

9 THE COURT: But there's no -- but she is going to say
10 there are no documents, and there aren't.

11 MR. SAMMI: Okay.

12 THE COURT: And y'all have the charge, and let me go
13 over the things that y'all -- that I remember that you wanted
14 in from the Defendants' perspective and maybe from the
15 Plaintiffs too.

16 Y'all wanted me to put some more instructions in
17 there, and you can put it in writing. I have seen it, and you
18 have timely made that request, that I put if you answer no, go
19 to this question and this page, and you showed me that page.
20 You can put that in there.

21 And everything you said in there I am considering and
22 I'm overruling it.

23 MR. STOJILKOVIC: Yes, Your Honor.

24 THE COURT: Okay.

25 MR. STOJILKOVIC: And do you want us to put our other

1 objections on the record?

2 THE COURT: Sure.

3 MR. STOJILKOVIC: Your Honor, Defendants believe, A,
4 there should be a curative instruction on spoliation because
5 the evidence that has come in does not satisfy the factors
6 under Federal Rule of Civil Procedure 37(e) as to prejudice or
7 as to bad faith, and because of that, the issue shouldn't go to
8 the jury, and the jury should be instructed that there was no
9 bad faith destruction of evidence in this case.

10 THE COURT: Okay. Yeah, and I agree that you timely
11 objected to that, and I'll allow you to think a little bit
12 about that and put something in there with regard to that,
13 because it doesn't matter what you put, I'm not going to put it
14 in there.

15 That's about as clear for the Fifth Circuit to
16 reverse me, isn't it? Okay.

17 MR. STOJILKOVIC: Thank you, Your Honor.

18 And we also object on the record to the instruction
19 that is in the charge about the jury considering the evidence
20 on this.

21 THE COURT: On the spoliation issue?

22 MR. STOJILKOVIC: Yes.

23 THE COURT: Yes. Okay. Overruled.

24 MR. STOJILKOVIC: And we also object to the use of
25 unjust enrichment language to be used within the damages

1 instructions and trade secret, tortious interference with
2 contract, and unfair competition. We believe under the case
3 law that that language should not be in there.

4 THE COURT: Overruled.

5 MR. STOJILKOVIC: And we also object to lack of
6 language in the abstraction-filtration comparison test. We
7 respectfully request that it also include language not
8 currently in there.

9 "The task of abstraction must be undertaken
10 conscientiously and systematically in order to separate ideas
11 from expression. Plaintiffs must introduce evidence that
12 conscientiously and systematically documents each level of
13 abstraction at which Plaintiffs have claimed there is
14 infringement."

15 We would like that added to the
16 abstraction-filtration comparison instruction.

17 THE COURT: Okay. I will overrule that too.

18 MR. STOJILKOVIC: That's all we have on that, Your
19 Honor.

20 THE COURT: That's it? You stayed up all night for
21 just that little bit?

22 MR. STOJILKOVIC: I stayed up all night for a variety
23 of reasons, Your Honor.

24 THE COURT: Okay.

25 MR. STOJILKOVIC: And I'm sure I will be addressing

1 some of those shortly.

2 THE COURT: All right. Mr. Hemr?

3 MR. HEMR: Your Honor, we have put our objections to
4 the extent that they differ from Your Honor's proposed charge
5 in writing, and I would just propose -- and I have handed the
6 document to defense counsel. I propose to hand it to
7 Mr. Jacobson.

8 THE COURT: That's great.

9 MR. HEMR: Do it that way, and I understand you'd be
10 overruling those.

11 THE COURT: I am overruling those, and I think we
12 have got those already, and you already told me those orally,
13 and I appreciate you putting them in writing. That's great.

14 And you can put yours in writing too that you
15 haven't, Mr. Stojilkovic.

16 MR. STOJILKOVIC: We will, Your Honor. We are making
17 one tweak and we will submit those today.

18 THE COURT: You will make it what?

19 MR. STOJILKOVIC: There is one thing that I addressed
20 orally that's not still in our draft.

21 THE COURT: Right. Just add that in there.

22 MR. STOJILKOVIC: Yeah.

23 THE COURT: I just want you to make sure you-all got
24 your objections in the record the way you want to make them.
25 okay?

1 Everybody fine with that?

2 MR. HEMR: We're fine, Your Honor. We prefer that we
3 file it, but Mr. Jacobson is going to file it.

4 THE COURT: No, that's fine. That's great.

5 Yes, sir, Mr. Sammi.

6 MR. SAMMI: One more point, Your Honor. We'd like
7 to -- plaintiffs respectfully move this Court to confirm that
8 the ZeniMax and Oculus source code contained in Exhibits PX132,
9 PX301, PX1162, PX1429, and PX1492 are in evidence,
10 understanding the difficulties that it can --

11 THE COURT: I am going to -- do you have any
12 objection?

13 MS. WILKINSON: Yes.

14 MR. STOJILKOVIC: Yes, Your Honor. These are the
15 ones we've been objecting to, and there has been no resolution
16 of that.

17 The bases of our objections --

18 THE COURT: Okay.

19 MR. STOJILKOVIC: -- are the following. One, these
20 documents were not presented or used with Mr. Dobkin. They are
21 simply, as Plaintiffs assert, underlying the analysis that he
22 offered. They were not used in court.

23 These are not individual documents. They're
24 compilations of source code, and they are compilations that
25 take -- they are also not the entire source code. They take

1 bits and pieces, but they don't really overlap with the Dobkin
2 analysis.

3 There's, you know, thousands of lines of code here
4 that -- that, you know, were not featured by Mr. Dobkin, so
5 it's neither -- neither are they excerpts that actually map on
6 to what Mr. Dobkin testified about, nor are they in some sense
7 comprehensive.

8 we also object beyond that, and there's two sets
9 of -- from the ZeniMax code files and two sets from the Oculus
10 code files.

11 we also object on the grounds -- so they weren't
12 moved in. They weren't used. They're not in evidence. Beyond
13 that, they're going to be very confusing, theirs -- these are
14 all marked on this yellow paper as if it's all confidential and
15 they're more confidential, but we know that large portions of
16 what's in the ZeniMax code is identical to what's in the open
17 source in Doom 3 BFG.

18 There are also portions in what is called the ZeniMax
19 code that are actually Oculus code because when Oculus sent
20 Mr. Carmack the SDK, he took some of it and worked with it and
21 then when Plaintiffs were on their way to the copyright office,
22 which they stopped off a day and a half before they filed this
23 suit, they actually copyrighted part of Oculus code or
24 attempted to. So it is not really all ZeniMax code in here.

25 It's confusing and, in our view, it is just not in

1 the record. It was not admitted, and on those bases, we
2 believe it does not come in and I'll let Mr. Sammi address it.

3 MR. SAMMI: Yes, Your Honor.

4 Exhibits PX132, PX301, PX1162, and PX1492 were
5 examined by Dr. Dobkin and described to the jury during his
6 discussion of ZeniMax's screen optics and image quality
7 technology including stereoscopic distortion precompensation
8 and stereoscopic chromatic aberration precompensation.

9 PX301 and PX1429 were examined by Dr. Dobkin and
10 described to the jury during his discussions of ZeniMax's
11 positional tracking technology, including HMD gravity
12 orientation and drift correction and HMD head and neck
13 model-based point-of-view adjustment.

14 Finally, Your Honor, PX132, PX301, PX1162, PX1429,
15 and PX1492 were examined by Dr. Dobkin and described to the
16 jury during his discussion of ZeniMax's latency reduction
17 technologies, including extrapolative orientation prediction,
18 HMD view bypass, and time warp.

19 In addition, Your Honor, this code was reviewed by
20 Professor Frederiksen-Cross as well as part of the bases of her
21 entire testimony of her abstraction filtration and comparison.

22 Furthermore, the copyright issue, ZeniMax's
23 copyrights affix in their code the moment it is put into a
24 tangible medium, which is when it is entered into the
25 repository. The date of the copyright registrations is

1 immaterial, and in addition, ZeniMax in its copyright
2 registrations, excluded previously authored material and is not
3 trying to claim any ownership in Oculus code.

4 THE COURT: Okay. Here's -- so you're not claiming
5 that the whole code was stolen, are you?

6 MR. SAMMI: No, Your Honor.

7 THE COURT: Not everything in that book is dastardly,
8 correct? Not everything.

9 MR. SAMMI: Your Honor, first of all, the source code
10 of ZeniMax is much larger than what these excerpts are.

11 THE COURT: Yeah, I'm sure.

12 MR. SAMMI: And we've tried to take these excerpts --
13 and we've talked about them throughout trial for three weeks:
14 ZeniMax VR testbed, ZeniMax VR implementation code, ZeniMax
15 Doom 3 BFG code. These are the code bases upon which our trade
16 secrets have been misappropriated and copyrights have been
17 infringed. They have been discussed by both experts in detail,
18 Your Honor, both copyright experts doing their abstraction
19 filtration comparison tests. The jury should be able to view
20 the evidence for itself.

21 MR. STOJILKOVIC: Your Honor, if I could respond to
22 that. I agree this is not the entire source code. That much
23 we agree. But these excerpts are far, far in excess of what
24 has been commented on by either Mr. Dobkin or Mr. -- or
25 Ms. Frederiksen-Cross.

1 Just to give an example of one of these
2 subpartitions, eight lines of code were cited in Mr. Dobkin's
3 analysis, the subpartition contains about 11,000 lines of code.
4 So it just -- it's not -- these aren't little snippets that
5 kind of map on to what we saw in these slides. This is a much
6 larger collection.

7 And on the point, the jury heard testimony from the
8 experts and I'm -- I have every confidence they will weigh it
9 and assess it. We just don't think these were used or moved
10 into evidence and they shouldn't come in now.

11 MR. SAMMI: My last response on this, Judge.

12 THE COURT: Sure.

13 MR. SAMMI: First of all, as we know, Judge, these
14 are part of a computer program and we cannot look at lines of
15 code in isolation. We must understand how those lines of code
16 relate into the entire module that fits into the entire
17 program. We have separated out selections. We can't put lines
18 of code in a vacuum in front of the jury.

19 And lastly, Your Honor, this code, there is no real
20 good argument as to why the jury can't see it. We have been
21 talking about it for three weeks.

22 THE COURT: Well, I mean, the concern is that you're
23 showing them this document that is really long and we're only
24 talking about portions of it. That's the concern, really.
25 It's not all and there is not something -- there is a lot of

1 pages where there is nothing in dispute. There is a lot of
2 pages like that.

3 MR. SAMMI: Your Honor --

4 THE COURT: That's my concern.

5 MR. SAMMI: That concern is alleviated by Professor
6 Dobkin taking and describing to the jury the fact that this is
7 not 4 terabytes of the code. But this is the code that relates
8 to and contains the code itself that has been copied,
9 nonliterally, and when he testified, Dr. Dobkin presented the
10 fact that this nonliterally copied code is in several versions
11 of Oculus's SDK and is found in several different iterations of
12 ZeniMax code.

13 THE COURT: And he didn't testify about every --
14 every line of code, did he?

15 MR. SAMMI: He didn't have time, Your Honor. I mean,
16 we had one hour for him to present his evidence, and he
17 presented an example of each of the seven trade secrets.

18 THE COURT: I didn't ask you about taking a cheap
19 shot at me.

20 MR. SAMMI: I didn't mean that like that, Your Honor.

21 THE COURT: I'm just saying has he -- whatever he
22 testified to, I'm happy for them to see that. That's fine.

23 MR. SAMMI: And that is Doom 3 BFG, VR implementation
24 code, and VR testbed.

25 THE COURT: I'm talking about what was up here and he

1 said look at this, that's copied from this. That's literal,
2 that's nonliteral, and all that. And there were pages and
3 pages and pages of that.

4 Anything that she testified to,
5 Ms. Frederiksen-Cross -- is she a doctor? I forgot. Is she a
6 doctor?

7 MS. KEEFE: No.

8 THE COURT: Ms. Frederiksen-Cross. I don't have any
9 problem with that. The problem is look at all of this is
10 stolen. Even under your theory, it's not all that. It's some
11 of it, but not all of it.

12 I'm happy to give them anything that you think that
13 was stolen. You can pull that out. They can see that. I'm
14 happy for them to see that. Otherwise, you're like taking --
15 if I wrote a plagiarized War and Peace, it wouldn't be the
16 whole book, it would be -- maybe it would be if I did write the
17 whole thing.

18 MR. SAMMI: Your Honor, that is a very good point,
19 because the third prong of the abstraction filtration
20 comparison test is to compare the programs themselves to see if
21 they are substantially similar. We can't just compare the
22 lines of code, and I know there's a disagreement between the
23 Defendants, they just want to look at the codes. We have to
24 interpret those lines of code in the context of the entire
25 program, because the copyright itself extends to the entire

1 program.

2 we're happy to see if -- to confirm that what code is
3 in these exhibits is code that's in the programs that is
4 related to the code that is alleged to be copied by ZeniMax,
5 Judge.

6 MR. STOJILKOVIC: Your Honor.

7 THE COURT: Yeah, I guess that's right. Maybe you
8 would have to look at the whole book that I wrote. So maybe.

9 MR. STOJILKOVIC: Your Honor, this is our objection.
10 No -- Mr. Dobkin, who is the witness they're relying on to get
11 this in, did not testify about --

12 THE COURT: You mean Doctor?

13 MR. STOJILKOVIC: Dr. Dobkin did not testify about
14 this kind of volume. He testified from his slides. You know,
15 it's maybe 12 pages. And to suggest that this is the heft of
16 what has been stolen is clearly prejudicial and it is just
17 not -- he didn't -- I mean, if they tried to offer this with
18 him and he said, I reviewed all this, I based all my opinions
19 on this, he didn't say that. And they did not move it in, and
20 it is clearly prejudicial not to argue, you know, here's the
21 volume of what's been stolen when the analysis presented in
22 those slides was, you know, maybe 10 sheets, maybe 12 sheets of
23 code.

24 MR. SAMMI: Your Honor, again, two points.

25 Dr. Dobkin clearly testified that he spent two years going

1 through 4 terabytes of code and then identified on his slides
2 by name VR testbed code, VR implementation code, and Doom 3 BFG
3 code. And which lines -- which trade secrets match up to
4 those -- that is contained in that code.

5 Now, we have then separated out that code into its
6 smallest constituent parts that you can read as a program for
7 that third step in the abstraction filtration comparison test.

8 Again, the law says we cannot look at the lines of
9 code in a vacuum. They must be compared to see if they are
10 substantially similar. That is the entire basis of
11 Dr. Dobkin's argument.

12 THE COURT: Anything else?

13 MR. STOJILKOVIC: You know, if they had used this
14 with him, we would have crossed him and crossed him effectively
15 of, oh, you said you spent two years of looking at this, so how
16 come the only thing you are testifying about is this little
17 snippet here and this little snippet here.

18 We didn't get a chance to do it and we didn't because
19 it wasn't admitted with him.

20 MR. SAMMI: Your Honor, I made attempts to admit this
21 throughout the case and they have done that by putting it on
22 the ELMO and saying through their own expert there are only
23 eight lines. The jury is well aware of the argument. They've
24 made it many, many times. There are only this many lines of
25 source code.

1 How many lines -- they asked their own expert, how
2 many lines of source code are there in the computer program?
3 There are this many.

4 MR. STOJILKOVIC: And just the last thing I'll say,
5 Your Honor, the only thing they started trying to move this in
6 was after the witness they said is the reason this should come
7 in was already off the stand.

8 THE COURT: Okay. Here's what I'm going to do.
9 Y'all can hold it up and make argument this was part of, you
10 know -- that this was part of this, what they stole. We want
11 you to consider it as a whole and blah, blah, blah, whatever
12 you want to say, you may make those arguments with regard to
13 that. But I'm only going to let you send back to the jury the
14 part that he marked and that sort of thing. And I will note
15 your exception to that.

16 But you can still make your argument that this thing
17 as a whole. I'll still allow you to make that argument. I'm
18 just not going to let you send it back there because I don't
19 think it all came in. I really don't.

20 But anyway -- so you've got all those red and green
21 and purple and pink sheets. That comes in clearly. Okay.

22 MR. SAMMI: I understand. Yes, Your Honor. May I
23 make one more objection on the record just to place it?

24 THE COURT: Sure.

25 MR. SAMMI: Thank you.

1 The copyrights themselves that are at issue in this
2 case cover the entire program, and those are the bases for the
3 copyright infringement claim and the jury should be able to see
4 that -- and we cannot put 4 terabytes in front of them, we
5 can't put a hard drive in front of them, but we have to show
6 them that this is protectable information from ZeniMax.
7 ZeniMax actually has copyrights on the computer programs.

8 It's as if we're talking about a book has been
9 nonliterally copied, but they say you can only show five pages
10 of the book. The book itself has a copyright on it as a work,
11 and that third prong of the abstraction filtration comparison
12 test requires those works of authorship to be compared as a
13 whole. And I understand we can't compare them as a whole, but
14 we have got to compare them in some form that incorporates
15 those lines into the modules of code that work in the program.

16 And Ms. Frederiksen-Cross also discussed that. She
17 said, well, this code calls other code --

18 THE COURT: Any of the code you talked about, send
19 back there, any of it, either side. Y'all can send all that
20 back there. Okay? All right.

21 MR. STOJILKOVIC: Only what was shown, Your Honor --
22 right? -- and what he actually talked, not -- I think it's
23 different things. And that's what we -- obviously, the
24 copyrights have come in and we're not saying that the
25 copyrights are not in evidence, but the code that we understand

1 your ruling that goes back is the particular portions that were
2 analyzed and testified to by the experts.

3 THE COURT: Yes.

4 MR. STOJILKOVIC: Thank you, Your Honor.

5 Unless you want to put more on the record.

6 MR. SAMMI: If I may. Sorry, Your Honor. Just --

7 THE COURT: Yes.

8 MR. SAMMI: Professor Dobkin: "I reviewed software
9 that has been produced by ZeniMax consisting of ZeniMax VR
10 testbed code, the Doom 3 BFG code, the VR implementation code."

11 This is the code that is copyrighted. And if he can
12 only have time to discuss on the stand -- not time, Your Honor,
13 but if he makes the argument to the jury using slides of seven
14 trade secrets found in various programs, he was asked and he
15 did testify and he was crossed on how many places did you find
16 this, and he said he found it in many different places.
17 There's a chart that we cannot just take a page from --

18 THE COURT: Does this chart show everywhere that he
19 found --

20 MR. SAMMI: It shows, yes, Doom 3 BFG, VR
21 implementation code, which trade secrets match up to which one.

22 THE COURT: You can send that back there.

23 MR. STOJILKOVIC: Your Honor, I think that was -- I
24 think that -- there's a difference between --

25 THE COURT: Is there a chart?

1 MS. WILKINSON: Yes.

2 MR. STOJILKOVIC: There's a difference --

3 (Pause)

4 THE COURT: You don't think the chart came in?

5 MR. STOJILKOVIC: No --

6 THE COURT: Or it is a summary?

7 MR. STOJILKOVIC: No, I think this was just in a
8 demonstrative.

9 Your Honor, the point I want to make is there a
10 difference between asking an expert what have they reviewed. I
11 mean, if we start admitting into evidence everything experts
12 have reviewed --

13 THE COURT: No, not what they reviewed. What they
14 reviewed and found to be stolen and bad stuff.

15 MR. STOJILKOVIC: What Mr. Dobkin found in his
16 analysis --

17 THE COURT: Dr. Dobkin.

18 MR. STOJILKOVIC: Dr. Dobkin.

19 -- to be literally copied is just what was featured
20 on those slides.

21 MR. SAMMI: Your Honor --

22 THE COURT: Well, let me see it.

23 MS. WILKINSON: Your Honor, we have a notebook --

24 THE COURT: No, no, one lawyer at a time.

25 MR. SAMMI: May I approach, Your Honor?

1 THE COURT: Yes.

2 MR. STOJILKOVIC: What page are you on?

3 MR. SAMMI: I'm sorry, I just handed it to the Judge.

4 MS. WILKINSON: Which page?

5 MR. SAMMI: I just handed it to the Judge.

6 MR. STOJILKOVIC: Your Honor, what page did Mr. Sammi
7 show you?

8 THE COURT: He's given me this chart.

9 MR. STOJILKOVIC: And we have a copy of it now, but I
10 wanted to know what page he directed you to.

11 THE COURT: He's talking about this right here.

12 MR. SAMMI: This is I believe the last -- the second
13 to last page.

14 THE COURT: Where he says --

15 (Pause)

16 MR. STOJILKOVIC: That's not an explanation of what
17 he looked at in all those things. That's just saying he looked
18 at large volumes of code.

19 MR. SAMMI: This is not saying what he looked at.
20 This is saying what he found in the copyrighted works, which
21 are listed, three of them, VR testbed, Doom 3 BFG, and VR
22 implementation.

23 MR. STOJILKOVIC: And what he found was seven trade
24 secrets and seven alleged copyrights -- copyright violations on
25 those specific bits of code, not the vast oceans of code

1 surrounding it.

2 MR. SAMMI: Your Honor, we disagree.

3 THE COURT: You think he said that he found it
4 throughout that whole big, thick thing?

5 MR. SAMMI: Yes. As his last step for comparison,
6 Your Honor, he has to compare the computer programs as a whole,
7 and that is --

8 THE COURT: Yes, yes, yes, yes, yes. But that's
9 not -- the whole thing is not -- not stolen. It's part of it.

10 MR. SAMMI: But -- okay. Yes, Your Honor. If -- if
11 you have lines of code, they must be -- you must look at at
12 least the modules of code if not the entire program in which
13 those -- in which that code is found.

14 Now, we talked about variables and where they call
15 and how these values are generated and used in the code. That
16 in context must be viewed in the module.

17 MR. STOJILKOVIC: We believe you've already ruled
18 correctly on this.

19 THE COURT: Stop.

20 Here's all your sheets in here about where he found
21 it.

22 MR. SAMMI: Yes, Your Honor.

23 THE COURT: Okay. I told you you can put those in.
24 That's already in. Isn't that in evidence?

25 MS. WILKINSON: No.

1 MR. SAMMI: That was a demonstrative.

2 THE COURT: Oh, these are demonstratives.

3 MR. SAMMI: Yes, sir.

4 THE COURT: Okay.

5 MR. SAMMI: He's not allowed to put his report in,
6 it's not evidence and that's --

7 THE COURT: No, I agree it's not.

8 MR. STOJILKOVIC: If they want the lines of code that
9 underline those sheets, it's going to be about 10 or 12 pages
10 of those, you know, 5,000-page binders.

11 MR. SAMMI: That is --

12 THE COURT: I thought you'd offered that as evidence.
13 It's just demonstrative. Okay.

14 MR. SAMMI: That would be severally prejudicial to
15 what the facts are in this case.

16 THE COURT: What would be?

17 MR. SAMMI: To cut out lines of code and paste them
18 together into some representation of what the actual
19 copyrighted work is when we know --

20 THE COURT: Okay. Okay. Here's what -- you can put
21 all this up there on there, since it's only demonstrative. You
22 can put it up there and say, look, here it is. Here's what he
23 found. Here's what he -- this is all this. This is all that.
24 But since it's a demonstrative, it doesn't go back.

25 And you can send any pages back that show the -- that

1 are in evidence that show where he found the stolen -- the
2 stolen lines.

3 MR. SAMMI: Okay. I think there will be a
4 disagreement with them that if there's lines on a page of
5 code -- just a page of code, it's even hard to make sense of a
6 page of code because it is just a printout.

7 THE COURT: So how can they make sense of a whole
8 book of code?

9 MR. SAMMI: By module, Your Honor, by module.

10 The code is in a piece of block that is utilized by
11 the program in certain different ways, and that code must be
12 viewed in that module to understand what it is and how to
13 compare it for copyright infringement.

14 THE COURT: Yeah, I don't buy that.

15 Okay. So you -- you can make your argument and use
16 all -- all that with regard to what you said, and since it is a
17 demonstrative only, you're going to use it out here, but it
18 doesn't go back. So I'm sure not putting the whole thing back
19 there since that was a demonstrative itself. But you can make
20 all those arguments you're going to make. It just doesn't go
21 back.

22 MR. STOJILKOVIC: Your Honor, we have two other
23 things that I think --

24 MR. SAMMI: I'm sorry, just to confirm, if we do --
25 the code, for example -- may I use this?

1 MR. STOJILKOVIC: Yes.

2 MR. SAMMI: For example, there is copied code in the
3 module --

4 THE COURT: If he said it was stolen and you offered
5 it into evidence and he said that's stolen, it can go back.

6 MR. STOJILKOVIC: Clarification, Your Honor. Please,
7 attorney conference for just one second. I want to make sure
8 I'm saying what I need to.

9 THE COURT: Okay.

10 (Pause)

11 MR. STOJILKOVIC: Your Honor, none of it was offered
12 into evidence, and this module idea --

13 So here is a module, Number 13. We think maybe of
14 this one, if I'm picking the right one, maybe there were 12
15 lines of code put up on the slide.

16 THE COURT: What did I say? I said whatever was
17 stolen. It's not the whole book. It's what was stolen.

18 MR. STOJILKOVIC: Mr. Sammi raised the module point.

19 THE COURT: Pull those lines out and show it if you
20 offered it into evidence.

21 MR. SAMMI: Yes, sir, we will -- we will do that.

22 THE COURT: Have you got somebody back there working
23 on that?

24 MR. SAMMI: We do.

25 THE COURT: Okay.

1 MR. SAMMI: We do, Your Honor. Thank you.

2 THE COURT: I'm assuming you are going to put it on
3 the ELMO or show it on the computer and say here's an example
4 of what was stolen. This was stolen, this was stolen, this was
5 stolen. Right?

6 MR. SAMMI: I may even use the book as a
7 demonstrative in front of --

8 THE COURT: You may do that.

9 MR. SAMMI: Yes.

10 THE COURT: But, I mean, you can argue the whole book
11 was stolen.

12 MR. SAMMI: Well --

13 THE COURT: And that probably will get an objection
14 and a sustained because it wasn't all stolen.

15 MR. SAMMI: I understand that, Judge. But the
16 argument that we've been making constantly is that the VR
17 testbed -- we cannot look at these lines of code in a vacuum.
18 These are --

19 THE COURT: You can make that argument. That's fine.
20 I don't have any problem with you making that argument. It's
21 not because parts of it were stolen. You are going to argue
22 all of it was stolen.

23 Is that kind of your argument?

24 MR. SAMMI: Well, if you take those lines out, the
25 program doesn't work.

1 THE COURT: Doesn't work. Okay.

2 And so these had -- to make it work, they had to have
3 these stolen lines, and so the testbed was stolen?

4 MR. SAMMI: Yes.

5 And, Your Honor, this is also a separate issue than
6 the id Tech 5 code that is based on a conversion claim and not
7 just a copyright claim, and that is Mr. Carmack testified to it
8 directly, and so did Professor Dobkin. 90,000 files
9 identically on the laptop that was found in his closet that has
10 never been -- and there is no argument here, because it has
11 never been released to the public, it has never been licensed
12 outside the ZeniMax family, and Mr. Carmack had it in his
13 possession in violation of his employment agreement, and it is
14 the subject to our conversion claim.

15 MR. STOJILKOVIC: And they didn't move it into
16 evidence, and it is not VR code, so --

17 MR. SAMMI: It -- this was an -- they tried to
18 preclude this in the beginning of the trial saying that it is
19 not VR code, and Professor Dobkin had a demonstrative, and he
20 discussed the fact that Rage -- Rage code is related to virtual
21 reality. Those are the --

22 THE COURT: Y'all are making jury arguments to me.
23 You are going to make that jury argument, he's going to make
24 his argument, and I don't know who they are going to believe on
25 the conversion deal. I don't know. You can make that

1 argument.

2 MR. SAMMI: Okay.

3 THE COURT: He can make that argument. That's fine.
4 I don't have a problem with that.

5 MR. SAMMI: Thank you, Judge.

6 THE COURT: Okay.

7 MR. STOJILKOVIC: Your Honor, eight exhibits that we
8 believe are clearly in evidence but Plaintiffs disagree, they
9 are exhibits, they are all defense exhibits, they are all just
10 little short documents, and I think the reason our
11 disagreement, what it stems from is, obviously, we had an
12 initial set of preadmits based on what was not objected to.
13 These were not on that list.

14 But these documents were used. They were shown and
15 previewed to defense counsel, they were used with a witness,
16 they were authenticated, they were read into the record, and
17 our understanding and how trial has been going is that, where
18 there has not been objection and the parties are in agreement
19 that it can be used, then even if it wasn't on the preadmitted
20 list, it got in.

21 I just want to give the Court one example because I
22 think it will --

23 THE COURT: Stop. Why do you not think they're in,
24 Mr. Liszy?

25 MR. LISY: Good morning, Your Honor. Two reasons.

1 First, we never waived the objection to any particular
2 document.

3 Second, documents weren't moved into evidence, and as
4 we understood Your Honor's rulings, documents that are on the
5 preadmitted list come into evidence without that specific
6 operation.

7 THE COURT: Yes.

8 MR. LISY: Documents that were not on the preadmitted
9 list --

10 THE COURT: Unless y'all came to some agreement with
11 regard to those documents otherwise, you could add to that
12 list. I wasn't trying to keep you from doing that.

13 MR. LISY: Understood. And with respect to these, we
14 did not.

15 THE COURT: Did I not say admitted? Is that the
16 problem on these?

17 MR. STOJILKOVIC: Yes, Your Honor. And if I could
18 just show one, if we could have the ELMO, I think --

19 THE COURT: Give me all eight right now, and I will
20 make my mind up real fast.

21 MR. STOJILKOVIC: All right. Do you want me to just
22 walk them up to you, Your Honor?

23 THE COURT: Yes.

24 MR. STOJILKOVIC: Let's do it.

25 (Pause)

1 MR. STOJILKOVIC: The first one Mr. Altman was
2 crossed about --

3 THE COURT: The emails?

4 MR. STOJILKOVIC: He was crossed about this Oculus
5 Rift wins Best Hardware and he said, well, that was --

6 THE COURT: Stop, stop, stop, stop.

7 MR. STOJILKOVIC: We --

8 THE COURT: Stop.

9 MR. STOJILKOVIC: Sorry, Your Honor.

10 Those are more copies.

11 THE COURT: Stop.

12 These are all copies of the one?

13 MR. STOJILKOVIC: Yes, multiple copies in each
14 folder.

15 (Pause)

16 MR. STOJILKOVIC: You can open that clip, Your Honor.
17 That was so I don't drop them all.

18 (Pause)

19 MR. STOJILKOVIC: This is the one Mr. Jackson was
20 examined about.

21 MR. LISY: That was a little bit different.

22 THE COURT: What's the deal on this last one?

23 MR. LISY: So that last one -- the last one is the
24 report prepared by KPMG. It was used with Mr. Jackson. We
25 made an objection on the record. It was overruled, Your Honor,

1 but we would submit that that document was not proper he used
2 with Mr. Jackson as the sponsoring witness and that it is
3 hearsay. There is no one from KPMG who can testify to it.

4 To the extent it was used for impeachment with
5 Mr. Jackson is one thing, but we would submit that shouldn't go
6 back to the jury.

7 MR. STOJILKOVIC: And our position is, Your Honor --

8 THE COURT: I think all these come in.

9 MR. STOJILKOVIC: Thank you, Your Honor.

10 THE COURT: Okay.

11 (Pause)

12 THE COURT: All right. With regard to all of these
13 exhibits, I remember those exhibits, and if I didn't say they
14 were admitted, I should have. They were admitted. And that
15 was my fault if I didn't.

16 They were clearly talked about in front of the jury,
17 every one of them. And with regard to the last document -- and
18 it's -- it was used with Mr. Jackson I think to impeach him. I
19 think that's what it was. And so I overruled the objection, so
20 that -- that did come in.

21 Okay. And what else, Mr. Liszy?

22 MR. LISZY: I don't think we have anything else.

23 MR. SAMMI: I've got one thing, Judge. On the --
24 just for -- it is not really another argument about the code,
25 but on the code issue, I would ask that the Judge ask the

1 Defendants to confirm on the record that, since they don't want
2 the source code in evidence, that they can't complain if there
3 is a finding of infringement that the jury wasn't shown the
4 full copyrighted --

5 THE COURT: You're absolutely right. They can't
6 complain about that.

7 MR. SAMMI: Okay.

8 THE COURT: I agree.

9 MR. SAMMI: Okay.

10 THE COURT: I mean, I --

11 MR. SAMMI: Will the Defendants confirm it?

12 THE COURT: That doesn't keep them from doing it.
13 That doesn't keep them from making the complaint. I agree with
14 you that they can't make the complaint later on.

15 MR. SAMMI: May I ask if Defendants can confirm that
16 if they're now requesting that this code not be sent back to
17 the jury? Because if there is a finding of infringement, I
18 fully expect, oh, the jury wasn't shown the code. How can they
19 reach a finding of infringement?

20 MR. STOJILKOVIC: Your Honor, I think the record
21 clearly reflects the position we took.

22 THE COURT: That doesn't answer the question. That
23 was a really nice -- that was a really nice --

24 MR. STOJILKOVIC: Thank you, Your Honor.

25 THE COURT: That was a really nice effort on your

1 part not to answer that question.

2 MR. STOJILKOVIC: We object to the admission of these
3 documents because they were not offered, and that is our
4 position.

5 THE COURT: Okay.

6 MR. STOJILKOVIC: Just one final clarification, Your
7 Honor. I do believe that these two headsets that have been
8 used repeatedly, DX physical 23 and physical 25 --

9 THE COURT: For demonstrative purposes or for
10 evidence?

11 MR. STOJILKOVIC: We thought that these two had come
12 in, Your Honor.

13 THE COURT: I don't know. I don't remember. I'm
14 sorry.

15 Do y'all think they are in too?

16 MR. LISY: No, we agree with Your Honor. We have
17 them for demonstrative purposes only.

18 MR. SAMMI: That's correct.

19 THE COURT: Yeah, that's my recollection, unless you
20 can show me they were admitted. I don't think they were. I
21 think they are demonstrative only.

22 MR. STOJILKOVIC: We will leave it at that, Your
23 Honor. Thank you.

24 THE COURT: Okay. Okay.

25 MR. SAMMI: Judge, I don't believe the answer from

1 Defendants was a confirmation or a denial. They are objecting
2 to us moving this into evidence, and the answer -- and I
3 said -- I asked them to --

4 THE COURT: They think you didn't do it at the proper
5 time. That's their position.

6 MR. SAMMI: And -- we disagree.

7 THE COURT: You made every effort, you think, to do
8 that?

9 MR. SAMMI: We have made every effort, Judge, that we
10 would do that, but I would like to know on the record that
11 Defendants will not come forward here today and say --

12 THE COURT: Yeah. I don't think they're going to say
13 that.

14 MR. SAMMI: Okay.

15 THE COURT: That -- you know, I agree with you that
16 it's kind of hard to make that, but if it's their position that
17 you didn't do it timely, I mean, they can make that argument.
18 I can't --

19 MR. SAMMI: One point on that, Judge.

20 when we move for evidence -- when we moved these
21 repeatedly during the trial into evidence, you -- I believe on
22 the record, you responded it was timely made but we needed to
23 discuss whether it's secure and there are other issues around
24 that.

25 THE COURT: I think I did say that too. I'm not

1 debating you about that.

2 MR. SAMMI: Okay.

3 THE COURT: I mean, whatever I said, I said.

4 MR. SAMMI: Thank you, Judge.

5 THE COURT: Okay. I'm not trying to sneak up on you.

6 MR. SAMMI: No, no.

7 THE COURT: I think I did say that.

8 Yes?

9 MS. WILKINSON: No, Your Honor. I was just going to
10 say this -- in this specific instance with Dr. Dobkin, he
11 didn't offer one piece of evidence, these are the
12 demonstratives for code, and that was the right person to do it
13 with. And that's -- I think that was when he was trying to get
14 it in earlier, and the only person who could actually lay the
15 foundation would have been Dr. Dobkin, and he didn't offer one
16 piece of evidence during Dr. Dobkin's testimony.

17 THE COURT: But he later on did.

18 MS. WILKINSON: That was after the fact -- the
19 timeliness matters not just to make a record. It's because we
20 would have done something differently if he had offered it.
21 That's the only reason --

22 THE COURT: I'm not debating you about that.

23 MS. WILKINSON: So him saying he did it later, again,
24 robs us of the opportunity to cross-examine Dr. Dobkin to make
25 the points we just made.

1 Point out to which pages you are actually saying are
2 stolen so we can show the jury and make the argument.

3 THE COURT: Yes, I agree. You may make that
4 argument. I'm not debating you about that, but I may have said
5 what I said which is, yeah, I think you may have made that at
6 the time. I can't go back and change that now.

7 MR. SAMMI: Sure.

8 THE COURT: It is what it is. That kind of hurts
9 both of you.

10 MR. SAMMI: Regarding -- regarding Defendants' cross
11 of Professor Dobkin, nothing was preventing them from using
12 what has been in this courtroom for three weeks and what we
13 have done been discussing to cross Professor Dobkin on it, as
14 well as Professor Frederiksen-Cross who relies upon the code
15 itself and admitted to reviewing the code to conduct her
16 analysis of her own abstraction.

17 THE COURT: Yes, I heard all this debate.

18 The bottom line is I will let you put in anything
19 that shows -- that you have anybody testify to that shows this
20 was copied, that document, but not the whole thing. It wasn't
21 all copied. Nobody said it was all copied.

22 MR. SAMMI: Understood, Your Honor. Thank you.

23 THE COURT: Okay. So you can do that, for the Fifth
24 Circuit's help when they're reviewing this.

25 okay. Anything else?

1 Are y'all ready?

2 Any other objections to the charge?

3 MS. WILKINSON: No. We put those in writing, as we
4 said --

5 THE COURT: All right.

6 MS. WILKINSON: -- and sent them to you, Your Honor.

7 THE COURT: Anything else, Mr. Hemr?

8 MR. HEMR: No, Your Honor.

9 THE COURT: Okay. So over all your other objections,
10 the Court's charge is what it is.

11 off the record.

12 (Discussion off the record)

13 THE COURT: Have we got copies for all them and y'all
14 have got copies?

15 MS. WILKINSON: Yes, Your Honor.

16 THE COURT: Sorry. Had administrative problems.
17 Okay. Probably just time for me to read the charge.

18 Bring them in.

19 On the record, both sides rest and close, correct?

20 MR. SAMMI: Yes, Your Honor.

21 (Plaintiffs rest and close)

22 MS. WILKINSON: Yes, Your Honor.

23 (Defendants rest and close)

24 THE COURT: Okay. And you have made all your
25 objections to the charge, and you almost agree to everything,

1 except there was a few little changes.

2 SECURITY OFFICER: All rise for the jury.

3 (Jury in)

4 THE COURT: Y'all be seated. Okay.

5 Y'all turn to page 5 of the jury charge and follow
6 along with me.

7 Members of the jury, you've heard all the evidence in
8 the case. I will instruct you on the law that must apply.

9 General Instructions.

10 It is your duty to follow the law as I give it to you
11 in this charge. On the other hand, you, the jury, are the
12 judges of the facts. Do not consider any statement that I have
13 made in the course of trial or make in these instructions as an
14 indication that I have any opinion about the facts of the case.

15 After I instruct you on the law, the attorneys will
16 have an opportunity to make their closing arguments. Remember
17 that any statements or arguments made by the lawyers are not
18 evidence and are not instructions on the law. They are
19 intended only to assist you, the jury, in understanding the
20 evidence and the parties' contentions.

21 Answer each question from the facts as you find them.
22 Your answers and your verdict must be unanimous. Many of the
23 claims and defenses in this case must be proven by a
24 preponderance of the evidence. The Plaintiffs must prove each
25 essential part of their claim by a preponderance of the

1 evidence.

2 Defendants must also prove each essential part of its
3 defenses by a preponderance of the evidence. Mr. Carmack must
4 prove each essential part of his counter claim by a
5 preponderance of the evidence.

6 The Plaintiffs must prove each essential part of its
7 defenses to Mr. Carmack's counterclaims by a preponderance of
8 the evidence. The preponderance of the evidence means the
9 greater weight and degree of credible evidence before you. In
10 other words, to establish a claim or defense by a
11 "preponderance of the evidence" means to prove that the claim
12 is more likely so than not so. In determining whether any fact
13 has been proved by a preponderance of the evidence in the case,
14 you may, unless otherwise instructed, consider the testimony of
15 all witnesses, regardless of who may have called them, and all
16 exhibits received in evidence, regardless of who may have
17 produced them. If the proof fails to establish any essential
18 part of the plaintiffs' claims by a preponderance of the
19 evidence, you should find for the defendants as to that claim.

20 The Plaintiffs have also asked for an award of
21 exemplary damages in relation to some of their claims in this
22 lawsuit. This must be decided under a higher standard of proof
23 than the preponderance of the evidence. This higher burden of
24 proof is "clear and convincing," which means the measure or
25 degree of proof that produces a firm belief or conviction of

1 the truth of the allegations sought to be established.

2 You are the sole judges of the "credibility" or
3 believability of each witness and the weight to be given to the
4 witness's testimony. In determining the weight to give to the
5 testimony of a witness, you should ask yourself whether there
6 was evidence tending to prove that the witness testified
7 falsely concerning some important fact, or whether there was
8 evidence that at some other time the witness said or did
9 something, or failed to say or do something, that was different
10 from the testimony the witness gave during the trial.
11 You should keep in mind, of course, that a simple mistake by a
12 witness does not necessarily mean that the witness was not
13 telling the truth as he or she remembers it, because people may
14 forget some things or remember other things inaccurately. So,
15 if a witness has made a misstatement, you need to consider
16 whether that misstatement was an intentional falsehood or
17 simply an innocent lapse of memory; the significance of that
18 may depend on whether it has to do with an important fact or
19 with only an unimportant detail.

20 The weight of the evidence is not necessarily
21 determined by the number of witnesses testifying as to the
22 existence or nonexistence of any fact. The testimony of a
23 single witness may be sufficient to prove any fact, even if a
24 greater number of witnesses may have testified to the contrary,
25 if after considering all the other evidence you believe that

1 single witness.

2 when knowledge of technical subject matter may be
3 helpful to the jury, a person who has special training or
4 experience in that technical field -- he or she is called an
5 expert witness -- is permitted to state his opinions on those
6 technical matters. However, you are not required to accept
7 that opinion. As with any other witness, it is up to you to
8 decide whether to rely upon it.

9 In deciding whether to accept or rely upon the
10 opinion of an expert witness, you may consider any bias
11 evidence that the expert witness has been or will be paid for
12 reviewing the case and testifying, or from evidence that he
13 testifies regularly as an expert witness and his income from
14 such testimony represents a significant portion of his income.

15 while you should consider only the evidence in this
16 case, you are permitted to draw such reasonable inferences from
17 the testimony and exhibits as you feel are justified in the
18 light of common experience. In other words, you may make
19 deductions and reach conclusions that reason and common sense
20 lead you to draw from the facts that have been established by
21 the testimony and evidence in the case.

22 There are two types of evidence you may consider in properly
23 finding the truth as to the facts in the case. One is direct
24 evidence. A fact is established by direct evidence when proved
25 by witnesses who saw the act done or heard the words spoken or

1 by documentary evidence. The other is indirect or
2 circumstantial evidence, the proof of a chain of circumstances
3 indicating the existence or nonexistence of certain other
4 facts. Direct proof of a state of mind is almost never
5 available and is not required. As a general rule, the law
6 makes no distinction between direct and circumstantial
7 evidence, but simply requires that you find the facts from a
8 preponderance of all the evidence, both direct and
9 circumstantial.

10 You have heard conflicting evidence in this case that
11 certain electronically stored information may have been deleted
12 or lost and therefore not available for use as evidence at
13 trial. If you find that any of these Defendants caused any of
14 these actions to occur, you may, but you are not required to,
15 infer that the information was unfavorable to those Defendants.
16 Do not let bias, prejudice or sympathy play any part in your
17 deliberations. A corporation and all other persons are equal
18 before the law and must be treated as equals in a court of
19 justice. This case should be considered and decided by you as
20 an action between persons of equal standing in the community,
21 of equal worth, and holding the same or similar stations in
22 life.

23 Now I will turn to the requirements of each of the
24 legal claims and defenses that the parties have brought in this
25 case.

1 A. Common Law Misappropriation of Trade Secrets

2 1. Common Law Misappropriation of Trade Secrets: Liability
3 Plaintiffs ZeniMax and id Software contend that Defendants
4 misappropriated what Plaintiffs regard as their trade secrets.
5 In this action, Plaintiffs have asserted that the following of
6 their technologies are trade secrets:

- 7 1. Distortion correction technology;
- 8 2. Chromatic aberration correction method;
- 9 3. Gravity orientation and sensor drift correction technology;
- 10 4. Head and neck modeling technology;
- 11 5. HMD view bypass technology;
- 12 6. Predictive tracking technology; and
- 13 7. Time warping methodology.

14 To be successful on a claim for trade secret
15 misappropriation against Defendants, ZeniMax and id Software
16 must prove each of the following elements:

- 17 1. The existence of a trade secret;
- 18 2. That Defendants acquired the trade secret through
19 the breach of a confidential relationship or by improper means;
- 20 3. That Defendants made commercial use of the trade
21 secret in their business without authorization; and
- 22 4. That Plaintiffs suffered damages as a result.

23 A trade secret is defined as a formula, pattern,
24 device or compilation of information used in a business which
25 gives its owner an opportunity to obtain an advantage over his

1 competitors who do not know or use it.

2 A trade secret differs from other secret information
3 in a business in that it is not simply information as to
4 single, ephemeral, short lived, or transitory events in the
5 conduct of the business. A trade secret is a process or device
6 for continuous use in the operation of the business.

7 You should consider the following factors in
8 determining whether the information claimed by ZeniMax and id
9 Software is a trade secret:

10 (1) the extent to which the information is known
11 outside their business;

12 (2) the extent to which it is known by employees and
13 others involved in their business;

14 (3) the extent of measures taken to safeguard the
15 secrecy of the information;

16 (4) the value of the information to Plaintiffs and to
17 their competitors;

18 (5) the amount of effort or money expended in
19 developing the information;

20 (6) the ease or difficulty with which the information
21 could be properly acquired or duplicated by others.

22 Because trade secrets do not fit neatly into each
23 factor every time, all six factors need not be satisfied,
24 rather, you should weigh these factors.

25 Matters of general knowledge in an industry cannot be

1 appropriated by one as his trade secret. Moreover, a former
2 employee may use the general knowledge, skills, and experience
3 acquired during his prior employment to compete with a former
4 employer and even do business with the former employer's
5 customers.

6 The subject matter of a trade secret must be secret
7 and must not be public knowledge in the trade or business.
8 Information that is generally known in the industry, readily
9 ascertainable by inspection or independent investigation, or
10 publicly disclosed is not a trade secret. Trade secret
11 protection is lost if one voluntarily discloses information to
12 another who has no obligation to keep the information secret or
13 if one otherwise fails to take reasonable precautions to ensure
14 its secrecy. A trade secret is not required to be novel or
15 unique and it may consist of a combination of simple and
16 otherwise known components. But if a process or idea is so
17 common, well known, or readily ascertainable that it lacks all
18 novelty, uniqueness, and originality, then it lacks the
19 necessary privacy of a trade secret.

20 If you find that ZeniMax owned any valid trade
21 secrets, you must determine whether ZeniMax has proven by a
22 preponderance of the evidence that Defendants acquired any of
23 those trade secrets as a result of a breach of a confidential
24 relationship between the parties or other improper means.

25 A person discovers another's trade secret through

1 "improper means" when he acts below the generally accepted
2 standards of commercial morality and reasonable conduct. To
3 discover a trade secret by "improper means" requires that the
4 Defendant have notice of the fact the information is a trade
5 secret. It is not improper to obtain knowledge of a trade
6 secret where the owner of the alleged trade secret voluntarily
7 discloses it or fails to take reasonable precautions to ensure
8 its secrecy.

9 To find a confidential relationship existed between
10 ZeniMax and one or more Defendants, you must find an express or
11 implied agreement existed between the parties in which they
12 both understood or ought to have understood the terms of the
13 agreement. You may find such a relationship was implied by the
14 business relationship or by the circumstances surrounding the
15 dealings between the parties. A breach of a confidentiality
16 agreement can establish a breach of a confidential
17 relationship.

18 A person "makes commercial use" of a trade secret
19 when he seeks to profit from the use of the secret. As a
20 general matter, any exploitation of the trade secret that is
21 likely to result in injury to the trade secret owner or
22 enrichment to a Defendant is commercial use of that trade
23 secret. Marketing goods that embody a trade secret, employing
24 a trade secret in manufacturing or production, relying on a
25 trade secret to assist or accelerate research or development,

1 or soliciting customers through the use of information that is
2 trade secret all constitute use of a trade secret.

3 2. Common Law Misappropriation of Trade Secrets:
4 Defenses

5 Defendants John Carmack and Brendan Iribe assert as a
6 defense that the statute of limitations bars ZeniMax and id
7 Software's claim for Mr. Carmack's and Mr. Iribe's alleged
8 misappropriation of trade secrets.

9 A statute of limitations is a law that provides that
10 a suit is barred if a plaintiff does not bring it within a
11 prescribed period of time. The time period within which a
12 lawsuit for alleged misappropriation of a particular trade
13 secret must be brought begins when ZeniMax and id Software
14 first discovered, or by the exercise of reasonable diligence
15 should have discovered, the facts that form the basis of its
16 alleged claim that a particular trade secret was
17 misappropriated. The question is whether the plaintiffs have
18 knowledge of facts which would cause a reasonable person to
19 diligently make inquiry to determine his or her legal rights.

20 The applicable statute of limitations period for
21 Plaintiffs' misappropriation claim is three years. For the
22 purposes of the statute of limitations, you may consider the
23 suit against Mr. Carmack and Mr. Iribe as being filed on March
24 31, 2016.

25 Defendants Mr. Carmack and Mr. Iribe have the burden

1 of proving the statute of limitations defense. In other words,
2 Mr. Carmack and Mr. Iribe must prove by a preponderance of the
3 evidence that ZeniMax and id Software did not bring their claim
4 for misappropriation of a trade secret within the applicable
5 time period.

6 Defendants assert that the defense of laches bars
7 Plaintiffs' misappropriation of alleged trade secrets. Laches
8 is an equitable defense with three elements: (1) delay in
9 asserting a right or claim; (2) the delay was not excusable;
10 and (3) there was undue prejudice to the party against whom the
11 claim is asserted.

12 Two kinds of prejudice may support a defense of
13 laches: (1) the delay has resulted in the loss of evidence; or
14 (2) the defendant has changed his position in a way that would
15 not have occurred if the plaintiff had not delayed. Defendants
16 have the burden of proving the laches defense by a
17 preponderance of the evidence.

18 A party asserting the defense of laches must have
19 "clean hands": That is, the party must have acted fairly and
20 without fraud or deceit as to the controversy in issue. If you
21 find that a Defendant has unclean hands, then you should not
22 find that Defendant has established the defense of laches.

23 Defendant Mr. Carmack contends that he is not liable for
24 trade secret misappropriation because of a doctrine called
25 estoppel by contract. Estoppel by contract prevents a party

1 from denying the terms of a valid of fully executed contract.
2 Estoppel by contract applies when a party to a contract
3 attempts to take a position inconsistent with the contract's
4 provision, to the prejudice of another. Here, Mr. Carmack
5 claims that ZeniMax should be prevented from denying the terms
6 of Mr. Carmack's 2009 employment agreement with ZeniMax and
7 that the position that the Plaintiffs have taken in this
8 litigation is inconsistent with the terms of that agreement.
9 Mr. Carmack must prove this defense by a preponderance of the
10 evidence.

11 3. Common Law Misappropriation of Trade Secrets:
12 Damages

13 If you find that the Plaintiffs have proved their
14 claim against any Defendant by a preponderance of the evidence,
15 you must determine the damages to which the Plaintiffs are
16 entitled. You should not interpret the fact that I am giving
17 instructions about the Plaintiffs' damages as an indication in
18 any way that I believe the Plaintiffs should, or should not,
19 win this case. It is your task to decide whether any Defendant
20 is liable. I am instructing you on damages only so that you
21 will have guidance in the event you decide that any Defendant
22 is liable and that the Plaintiffs are entitled to recover money
23 from any Defendant.

24 If you find that any Defendant is liable to the Plaintiffs,
25 then you must determine an amount that is fair compensation for

1 the Plaintiffs' damages. These damages are called compensatory
2 damages. The purpose of compensatory damages is to make
3 ZeniMax and id Software whole -- that is, to compensate them
4 for the damage that they have suffered.

5 You may award compensatory damages only for injuries
6 that ZeniMax and id Software prove were proximately caused by
7 Defendants' allegedly wrongful conduct. Proximate cause means
8 a cause that was a substantial factor in bringing about an
9 event, and without which cause such event would not have
10 occurred. In order to be a proximate cause, the act or
11 omission complained of must be such that a person using the
12 degree of care required of him would have foreseen that the
13 event, or some similar event, might reasonably result
14 therefrom. There may be more than one proximate cause of an
15 event.

16 The damages that you award must be fair compensation
17 for all of ZeniMax and id Software's damages, no more and no
18 less. You should not award compensatory damages for
19 speculative injuries, but only for those injuries which ZeniMax
20 and id Software have actually suffered or that ZeniMax and id
21 Software are reasonably likely to suffer in the future.

22 If you decide to award compensatory damages, you
23 should be guided by dispassionate common sense. Computing
24 damages may be difficult, but you must not let that difficulty
25 lead you to engage in arbitrary guesswork. On the other hand,

1 the law does not require that ZeniMax and id Software prove the
2 amount of their losses with mathematical precision, but only
3 with as much definiteness and accuracy as the circumstances
4 permit.

5 You must use sound discretion in fixing an award of
6 damages, drawing reasonable inferences where you find them
7 appropriate from the facts and circumstances in evidence.

8 You may impose damages on a claim solely upon a
9 Defendant or Defendants that you find are liable on that claim.
10 Although there are multiple Defendants in this case, it does
11 not necessarily follow that if one is liable, all or any of the
12 others are also liable. Each Defendant is entitled to a fair,
13 separate, and individual consideration of its case without
14 regard to your decision as to the other Defendants. If you
15 find that only one Defendant is responsible for a particular
16 injury, then you must award damages for that injury only
17 against that Defendant. If you find that any Defendant is
18 liable to the Plaintiffs, bear in mind that ZeniMax is only
19 entitled to be made whole once, and may not recover more than
20 it has lost.

21 In an action for trade secret misappropriation,
22 Plaintiffs can recover actual damages based on the value of
23 what has been gained by the Defendants by their
24 misappropriation. The value of what the Defendants have gained
25 as a result of the misappropriation can be measured by a number

1 of methods:

2 1. One of the ways used to measure this value is the
3 actual profits resulting from the use or disclosure of the
4 trade secrets;

5 2. Damages may also be measured by the amount that a
6 reasonably prudent investor would have paid for the trade
7 secrets at the time the trade secrets were misappropriated;

8 3. Damages may also be measured by the costs saved by
9 the Defendants; and

10 4. Damages may be measured by a reasonable royalty,
11 which would be an amount of money that would have been agreed
12 to, at the time the trade secrets were misappropriated, in a
13 hypothetical arm's-length negotiation between a willing
14 licensor and a willing licensee for the trade secrets. In
15 determining the amount of a reasonable royalty, you may
16 consider evidence of any of the following factors:

17 (1) the resulting and foreseeable changes in the
18 parties' competitive posture;

19 (2) prices past purchasers or licensees may have paid;

20 (3) the total value of the secret to ZeniMax and id
21 Software, including Zenimax and id Software's development cost
22 and the importance of the secret to Zenimax and id Software's
23 business;

24 (4) the nature and extent of the use Defendants
25 intended for the trade secrets; and

1 (5) whatever other unique factors that might have been
2 affected by the parties' agreement.

3 Plaintiffs also contend that the Defendants were
4 unjustly enriched in connection with their act of
5 misappropriation. Unjust enrichment is an equitable principle
6 holding that one who unjustly receives benefits should make
7 restitution for those benefits, and is typically found where
8 one person has obtained a benefit from another by fraud,
9 duress, or taking of an undue advantage or has passively
10 accepted benefits that it would be unjust for that person to
11 retain.

12 If you find the Defendants were unjustly enriched by
13 their act of misappropriation and should make restitution for
14 any property or benefits they may have received, you should
15 award that amount of money against Defendants and in favor of
16 Plaintiffs.

17 4. Common Law Misappropriation of Trade Secrets:
18 Jury Questions.

19 QUESTION 1:

20 Did ZeniMax prove, by a preponderance of the
21 evidence, that any Defendant misappropriated the trade secrets
22 claimed by ZeniMax and id Software?

23 Answer "Yes" or "No" for each Defendant.

24 Then their names are listed and a blank.

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Facebook: _____

Palmer Luckey: _____

Brendan Iribe: _____

John Carmack: _____

1 QUESTION 2:

2 If you answered "yes" to Question 1 for Brendan Iribe
3 or John Carmack, answer this question for each of these
4 Defendants that you answered "yes" in Question 1. Otherwise,
5 do not answer this question and skip to Question 3.

6 Do you find that the statute of limitations bars
7 ZeniMax and id Software's claim for trade secret
8 misappropriation against John Carmack and/or Brendan Iribe?
9 Answer "yes" or "no" for each Defendant.

10 Brendan Iribe and John Carmack.

11 Blanks for where you put the answer "yes" or "no."

12 QUESTION 3:

13 If you answered "yes" for Question 1 for John
14 Carmack, answer this question. Otherwise, do not answer this
15 question and skip to Question 4.

16 Do you find that the doctrine of estoppel by contract
17 bars ZeniMax and id Software's claim for trade secret
18 misappropriation against John Carmack?

19 Answer "yes" or "no."

20 John Carmack and a blank for you to put "yes" or
21 "no."

22 QUESTION 4:

23 If you answered "yes" to any part of Question 1 for
24 any Defendant, answer this question for each of the Defendants
25 that you answered "yes" in Question 1. Otherwise, do not

1 answer this question and skip to Question 7.

2 Do you find that doctrine of laches bars ZeniMax and
3 id Software's claim for trade secret misappropriation?

4 Answer "yes" or "no" for each Defendant.

5 Oculus, _____, "yes" or "no."

6 Facebook, _____, "yes" or "no."

7 Palmer, _____, "yes" or "no."

8 Brendan Iribe, _____, "yes" or "no."

9 John Carmack, _____, "yes" or "no."

10 QUESTION 5:

11 Answer this question if you answered "yes" in
12 Question 1 for any Defendant and "no" in Question 2,
13 Question 3, and Question 4 for that Defendant. Otherwise, do
14 not answer this question and skip to Question 7.

15 What amount of damages, if any, did ZeniMax and id
16 Software prove were proximately caused by Defendants'
17 misappropriation?

18 Answer in dollar and cents, if any.

19 And then there is a blank for any damages you find.

20 QUESTION 6:

21 Answer this question if you assessed damages in
22 Question 5. Otherwise do not answer this question and skip to
23 Question 7.

24 For each person you found caused or contributed to
25 cause the damages to Plaintiffs, find the percentage of

1 responsibility attributable to each. Assign percentages of
 2 responsibility only to those Defendants you found caused or
 3 contributed to cause the damages for misappropriation of trade
 4 secret. The percentages you find must total 100 percent. The
 5 percentages must be expressed in whole numbers. The percentage
 6 of responsibility attributable to any one is not necessarily
 7 measured by the number of act or omissions found.

8 Oculus, _____, and percentage.

9 Facebook, _____, percentage, if any.

10 Palmer Luckey, _____, percentage, if any.

11 Brendan Iribe, _____, percentage, if any.

12 John Carmack, _____, percentage, if any.

13 And the total would have to be 100 percent, if you
 14 find any.

15 B. Copyright Infringement: Liability

16 The Plaintiffs have also asserted claims of copyright
 17 infringement against the Defendants. Plaintiffs' claims of
 18 copyright infringement are based on their allegation that
 19 Defendants copied some of Plaintiffs' computer code.

20 Plaintiffs do not assert a copyright infringement claim based
 21 on any other type of copyright work or any use of copyrighted
 22 works by Defendants in promotional materials, such as the
 23 Oculus kickstarter.

24 Copyright is the name for the protection that the law
 25 extends to an author of original work against the unauthorized

1 appropriation of that work by others. "Author" is a term we
2 use in copyright law for the creator of an original work.

3 This case involves computer programs. A "computer
4 program" is a set of statements or instructions to be used
5 directly or indirectly in a computer in order to bring about a
6 certain result. A computer program can be a copyrightable
7 work. ZeniMax and id Software own a copyright in a particular
8 computer program if they created the work, or received the
9 copyright from someone else who owned it.

10 In no case does copyright protection for an original
11 work of authorship extend to any idea, procedure, process,
12 system, method of operation, concept, principle, or discovery,
13 regardless of the form in which it was described, explained,
14 illustrated, or embodied in such work.

15 Accordingly, you must filter out all of those
16 elements of computer program which unprotectable. Filtration
17 should eliminate from the comparison the unprotectable elements
18 of ideas, processes, facts, public domain information, merger
19 material, scenes a faire material, and other unprotectable
20 elements suggested by the particular facts of the computer
21 program under examination.

22 Under the merger doctrine, copyright protection is
23 denied to expression that is inseparable from or merged with
24 the ideas, processes, or discoveries underlying the expression.

25 Under the scenes a faire doctrine, a protection is

1 denied to those expressions that are standard, stock, or common
2 to a particular topic or that necessarily follow from a common
3 theme or setting. Furthermore, where a particular expression
4 is common to the treatment of a particular idea, process, or
5 discovery, it is lacking in the originality that is necessary
6 for copyright protection.

7 Copyright protection automatically exists in a work
8 the moment it is fixed in any tangible medium of expression.
9 The owner of the copyright may register the copyright by
10 delivering to the copyright office of the Library of Congress a
11 copy of the proprietary work after examination and determine
12 that the material deposited constitutes copyrightable subject
13 matter and that legal and formal requirements are satisfied,
14 the register of copyrights registers the work and issues a
15 certificate of registration to the copyright owner.

16 The evidence in this case includes certificates of
17 the copyright registration for ZeniMax and id Software's
18 computer software from the copyright office. If you find with
19 respect to a particular certificate that the certificate was
20 issued within the five years after first publication of ZeniMax
21 and id Software's software program referenced in that
22 certificate, you are instructed that certificate is itself
23 evidence of the facts stated in the certificate.

24 To succeed on their claim, ZeniMax and id Software
25 must prove the following things:

1 (1) The computer program in question is the subject of a valid
2 copyright;

3 (2) ZeniMax and id Software own the copyright; and

4 (3) Defendants copied protected expression contained in ZeniMax
5 and id Software's copyrighted work.

6 Plaintiffs' certificates of registration of
7 Plaintiffs' copyrights are what is called prima facie evidence
8 of the element of ownership. In other words, if there is no
9 evidence against ZeniMax and id Software as to that element,
10 the registration certificate alone is sufficient to establish
11 ownership.

12 To be eligible for copyright protection, a work must
13 be original and in a form that can be seen, heard, reproduced,
14 or communicated, either directly or with the aid of a machine
15 or device. A work is original if it was created independently,
16 as opposed to being copied from another work. It must contain
17 at least some minimal degree of creativity. The work need not
18 be completely new. A work can be original even if it
19 incorporates elements that are not original to the author.
20 However, only the original elements added by the author are
21 protected by copyright.

22 Plaintiffs' certificates of registration of
23 Plaintiffs' copyrights are what is called prima facie evidence
24 that ZeniMax and id Software's copyrights are valid.
25 Relatedly, those registrations are prima facie evidence that

1 those registered works are original. In other words, if there
2 is no evidence against ZeniMax and id Software as to the
3 originality of the registered works, the registration
4 certificates alone are sufficient to establish originality.

5 Copyright protection extends not only to the literal
6 elements of a computer program, for example, its source code,
7 but also to its nonliteral elements, such as the program
8 architecture, structure, sequence and organization, operation
9 modules and computer-user interface.

10 To determine if Defendants infringed any of ZeniMax
11 and id's software copyrights, you must consider two separate
12 questions. The first is whether the Defendants actually copied
13 from any of ZeniMax and id's Software's copyrighted computer
14 programs. This is known as factual copying and may be proved
15 by the direct evidence of copying or by circumstantial
16 evidence.

17 Circumstantial evidence may support an inference of
18 copying if ZeniMax and id Software proves that Defendants had
19 access to any of ZeniMax and id Software's copyrighted computer
20 programs when Defendants created their own programs and that
21 the two works are so similar that a reasonable person would
22 conclude that the similarities could only be due to copying.

23 Such an inference of copying may be rebutted, i.e.
24 countered, by evidence that the accused work was created
25 independently. If Defendants offer evidence of independent

1 creation, ZeniMax and id Software have the burden of proving
2 that Defendants in fact copied protected material from ZeniMax
3 and id Software.

4 If you find that actual copying occurred, however,
5 that does not by itself show copyright infringement. ZeniMax
6 and id Software also must prove that the work they claim is an
7 infringement is "substantially similar" to its copyrighted
8 work. To do this, ZeniMax and id Software must prove that the
9 copying of protected material was so extensive that it renders
10 the accused work and the copyrighted work substantially
11 similar. A quantitatively small amount of copied material may
12 justify a finding of substantial similarity, or may be so small
13 as to not justify a finding of substantial similarity. To make
14 this determination, you must make a side-by-side comparison
15 between the two works, including literal and nonliteral
16 elements, and determine whether you find them, on the whole, to
17 be substantially similar.

18 Establishing substantial similarity for non-literal
19 elements of a computer program is a three-part analysis that
20 involves:

- 21 (1) breaking down ZeniMax and id Software's computer
22 program into its constituent parts;
- 23 (2) examining each of the constituent parts for such things
24 as incorporated ideas, expression that is necessarily
25 incidental to those ideas, and elements that are taken from the

1 public domain, to sift out all non-protectable material; and
2 (3) comparing this material with the Defendants' program to
3 determine whether the protectable elements of the programs are
4 substantially similar as to warrant a finding of infringement.

5 This is known as the "abstraction-filtration-
6 comparison" test, which I will explain in more detail in a
7 moment.

8 In making this determination, you must remember that
9 not all similarities give rise to copyright infringement.
10 Copyright protection does not extend to any of the ideas,
11 procedures, methods of operation, concepts, or principles
12 embodied in a work, but only to the particular form in which
13 those ideas, procedures, etc., are expressed. Thus, while the
14 original expression of an idea may be protected, the idea
15 itself is not. Anyone is free to copy the idea, so long as
16 they do not copy the author's original way of expressing that
17 idea, but develop their own form of expression.

18 Likewise, similarities that serve a functional
19 purpose or that are due to external factors do not give rise to
20 a claim of infringement. In the area of computer programs,
21 these external factors include hardware standards and
22 mechanical specifications, software standards and compatibility
23 requirements, computer manufacturer design standards, target
24 industry practices and demands, and computer industry
25 programming practices. Thus, for example, similarities

1 resulting from the fact that two works perform the same
2 function, or that are dictated by industry requirements or
3 programming standards, will not support a claim of copyright
4 infringement.

5 The term used for describing the operations of a
6 computer at higher and higher levels is "abstraction." For a
7 computer program, there are generally six levels of
8 abstraction.

9 (1) the main purpose; (2) the program structure or
10 architecture; (3) modules; (4) algorithms and data structures;
11 (5) source code; and (6) object code.

12 At the level of object code, there is no abstraction,
13 because the object code controls each smallest step of the
14 computer. As we go to higher levels we abstract from, that is,
15 leave out more and more detail of the procedures that the
16 program performs, until we reach the highest level of
17 abstraction, at which we simply describe the ultimate purpose
18 of the program, such as calculating the Dow Jones average, or
19 for a word-processing program, creating a document.

20 Abstraction is the first part of the three-part test
21 for infringement. When we are determining whether a computer
22 program has been infringed, we have to take into account the
23 fact that, just as a program can be described at various
24 levels, it can be copied at various levels. If someone wants
25 to copy another's program, he might simply copy the program's

1 object code or source code. But he might also, without copying
2 the literal object code or source code itself, copy the
3 substance of each instruction that the code gives the computer,
4 perhaps paraphrasing the source code (just as one might
5 paraphrase a standard literary work), or perhaps using a
6 different programming language. Or he might copy the program
7 at higher levels of abstraction by, for example, copying the
8 way in which the low-level procedures prescribed by the program
9 are organized and work together so as to carry out higher-level
10 procedures. Since a typical commercial computer program
11 contains thousands of procedures, which are written and
12 organized so as to operate in certain sequences and
13 combinations, there are many ways in which parts of a program
14 can be copied so that another programmer does not have to
15 create his work anew. Just as someone may infringe the
16 copyright in a short story if he copies the story but
17 paraphrases each paragraph, someone may infringe the copyright
18 in a computer program by copying at some level of abstraction,
19 the procedures that it causes the computer to carry out, or the
20 sequence or organization of those procedures.

21 The abstraction-filtration-comparison test is
22 necessary in order to detect infringement at levels of
23 abstraction above that of object code or source code. In the
24 abstraction part of the test, we can describe a computer
25 program at various levels of abstraction, from the levels of

1 object code all the way up to the program's ultimate purpose.
2 However, in this case it is necessary for you to consider the
3 program only at levels of abstraction at which Plaintiffs have
4 claimed there is infringement.

5 The second part of the three-part test is filtration.
6 Computer programs, like standard literary works, contain
7 unprotected as well as protected matter, and it is only the
8 copying of protected matter that counts toward infringement.
9 Therefore, at each level of abstraction that you consider, it
10 is necessary to "filter out" unprotected matter. As in the
11 case of standard literary works, ideas are unprotectable
12 matter. However, computer programs can also contain other
13 types of unprotected matter. Just as we want to leave ideas
14 unprotected by copyright so that they are available for use by
15 others, we do not want copyright protection to extend to a
16 computer program's functionality. The purpose of a computer
17 program is its function. For example the function of a word
18 processor program is to create documents. Although a
19 programmer may have written a program that adequately performs
20 a certain function, we want other programmers to be able to
21 write other programs that perform the same function. The
22 functions performed by a program are therefore unprotectable
23 matter.

24 In addition, at a certain level of abstraction, the
25 procedures that a program uses to carry out its functions are

1 also unprotected. Just as copyright protection does not extend
2 to the idea or function of creating a document, it does not
3 extend to the procedure of putting letters onto the computer
4 monitor or to the other procedures that it is necessary for a
5 word processor to perform.

6 Therefore, at a certain level of abstraction, similar
7 to the level of ideas, another person can copy the procedures
8 that a program causes a computer to carry out because they are
9 unprotected matter. Standard procedures, methods, and
10 programming techniques that programmers regularly use are not
11 protected by copyright.

12 There are also other aspects of a computer program
13 that are not protected by copyright. Each computer must have
14 an operating system program, which controls its basic
15 operations such as the computer's use of its memory, accepting
16 input, creating files, or producing output to a monitor.
17 Application programs, such as word processing or spreadsheet
18 programs, are designed to run on particular operating systems.
19 Those aspects of an application program that are necessary in
20 order for it to be able to run on a certain operating system,
21 or are necessary for it to be able to operate with other
22 programs are unprotected matter. There are also
23 characteristics that a program may not be required to have in
24 order to run at all, but which it must have if it is to operate
25 reasonably efficiently. Those characteristics are also

1 unprotected matter. In general, acts of a program that are
2 reasonably required in order for the program to accomplish the
3 functions for which it was designed, or that are reasonably
4 required by external factors such as hardware or other
5 software, or for reasonably efficient operation, are not
6 protected by copyright.

7 However, where there are reasonable alternatives to
8 elements of a program that do not involve a significant loss of
9 functionality or efficiency, you may find such elements to be
10 protected matter.

11 The third part of the abstraction-filtration-
12 comparison test is comparison. Here, at each level of
13 abstraction that you are considering, you must compare the
14 protected matter in the Plaintiffs' programs the parts that
15 have not been filtered out with the code used by the
16 Defendants. When you make that comparison, you should take
17 into account any relevant expert testimony presented by the
18 Plaintiffs or Defendants.

19 You must decide whether, taking into account copying
20 at all levels of abstraction, the Plaintiffs have proven by a
21 preponderance of the evidence that Defendants copied
22 substantial protected matter.

23 A copyright may also be infringed by vicariously
24 infringing. A person is liable for copyright infringement by
25 another if the person has a financial interest and the right

1 and ability to supervise the infringing activity, whether or
2 not the person knew of the infringement.

3 In order to prove vicarious copyright infringement,
4 Plaintiffs have the burden of proving by a preponderance of the
5 evidence that:

- 6 1. One of the Defendants infringed Plaintiffs' copyrights, as
7 defined in the instructions I have already given you;
- 8 2. Another Defendant profited from that initial infringement;
9 and
- 10 3. That other Defendant had the right and ability to stop or
11 limit the initial infringement but failed to do so.

12 A copyright may also be infringed by contributory
13 infringement. With certain exceptions, a person is liable for
14 copyright infringement by another if the person knows or should
15 have known of the infringing activity and induces, causes, or
16 materially contributes to the activity.

17 In order to prove contributory copyright
18 infringement, Plaintiffs have the burden of proving by a
19 preponderance of the evidence that:

- 20 1. One of the Defendants infringed Plaintiffs' copyrights, as
21 defined in the instructions I have already given you; and
- 22 2. Another Defendant knew or should have known of that initial
23 infringement; and
- 24 3. That other Defendant induced, caused, or materially
25 contributed to the initial infringement.

1 (Pause)

2 THE COURT: Okay. I'm going to change under 3 on
3 page 32, the first 3 and the second 3 from "other" to "another"
4 unless y'all object. Any -- is that okay? Instead of saying
5 that "other Defendant," should be "another," I think.

6 (Pause)

7 THE COURT: Oh wait. It's on page 31. Mine is off.

8 THE CLERK: I apologize.

9 THE COURT: Okay. So let me see where we are. Yeah,
10 y'all are flipping different than I was. Okay.

11 See where it says "other Defendant" on the bottom of
12 page 30 and "other" on page 31? I'm going to change that to
13 "another."

14 Any objection?

15 MR. STOJILKOVIC: Your Honor, I believe the "other"
16 in paragraph 3 refers to the other Defendant in paragraph 2 and
17 that's why it says that.

18 THE COURT: You think "other" is right?

19 MR. STOJILKOVIC: Yep.

20 MR. HEMR: I agree.

21 THE COURT: Y'all want me to leave "other"?

22 MR. HEMR: I agree, Your Honor.

23 THE COURT: Well, I will leave "other."

24 we will fight about the grammar later.

25 Oh, "that other Defendant." Okay. You're right. I

1 kind of had it -- think of it differently.

2 Okay.

3 "That other -- that other Defendant induced, caused,
4 or materially contributed to the initial infringement."

5 I hate to admit y'all were right.

6 2. Copyright infringement: Defenses

7 And this is page 31 on y'all's and how I got off, I
8 don't know.

9 Defendants claim that they are not liable for
10 copyright infringement because they hold a license to use the
11 Plaintiffs' copyrighted works. A license is essentially a
12 promise by the licensor not to sue the licensee. A license
13 authorizing the use of copyrighted material can be express or
14 implied. An express license could take the form of a written
15 or oral agreement. An implied license is one which may be
16 inferred from the circumstances surrounding the use of the
17 copyrighted material and the behavior of the licensor regarding
18 use of the copyrighted material, including for example,
19 knowledge of the use and lack of any objection to use. In
20 considering whether an implied license existed, you may
21 consider what the parties said and did in light of the
22 surrounding circumstances, including any earlier course of
23 dealing. If you find by a preponderance of the evidence that
24 Defendants had an express or implied license to use the
25 Plaintiffs' copyrighted material, your verdict must be for

1 Defendants.

2 Defendants also contend that they are not liable for
3 copyright infringement because any use they made of the
4 Plaintiffs' copyrighted work was de minimis. For an
5 unauthorized use of a copyrighted work to be actionable, the
6 use must be significant enough to constitute infringement.
7 This means that even where the fact of copying is conceded, no
8 legal consequences will follow from that fact unless the
9 copying is substantial.

10 A use is considered de minimis if it is so meager and
11 fragmentary that the average audience would not recognize the
12 appropriation. Copying might also be considered de minimus
13 when the use of the work is so fleeting or trivial that it is a
14 trifle with which the law should not be concerned. Sometimes
15 even copying the entire work or much of the work can be de
16 minimus under this definition.

17 Defendants must prove by a preponderance of the
18 evidence that any protected material that they might have
19 copied was de minimus.

20 Defendants John Carmack and Brendan Iribe assert as a
21 defense that the statute of limitations bars ZeniMax and id
22 Software's copyright infringement claim. As we have discussed,
23 a statute of limitations is a law that provides that a suit is
24 barred if Plaintiffs do not bring it within a prescribed period
25 of time. The time period within which the copyright

1 infringement suit must be brought begins when ZeniMax and
2 id Software first knew, or by the exercise of reasonable care
3 should have known, of the facts that form the basis of their
4 copyright infringement claim. The applicable statute of
5 limitations period for a claim of copyright infringement is
6 three years. For these purposes you can consider that this
7 suit against Defendants Mr. Carmack and Mr. Iribe was filed on
8 March 31, 2016.

9 For copyright infringement, each act gives rise to a
10 discrete claim with its own statute of limitations period. So,
11 when a person has engaged in a series of discrete infringing
12 acts, the copyright holder's suit may be timely with respect to
13 more recent acts of infringement, but untimely with respect to
14 prior acts of the same or similar kind.

15 Defendants Mr. Carmack and Mr. Iribe have the burden
16 of proving the statute of limitations defense by a
17 preponderance of the evidence.

18 Defendants also assert that the defense of laches
19 bars Plaintiffs' claim of copyright infringement. Laches is an
20 equitable defense with three elements: (1) delay in asserting a
21 right or claim; (2) the delay was not executable; and (3) there
22 was undue prejudice to the party against whom the claim is
23 asserted.

24 Two kinds of prejudice may support a defense of
25 laches: (1) the delay has resulted in the loss of evidence; or

1 (2) the defendant has changed his position in a way that would
2 not have occurred if the plaintiff had not delayed. Defendants
3 have the burden of proving the laches defense by a
4 preponderance of the evidence.

5 A party asserting the defense of laches must have
6 "clean hands": That is, the party must have acted fairly and
7 without fraud or deceit as to the controversy in issue. If you
8 find that a Defendant has unclean hands, then you should not
9 find that Defendant has established the defense of laches.

10 3. Copyright Infringement: Damages

11 If you find that the Plaintiffs have proved their
12 claim against any Defendant by a preponderance of the evidence,
13 you must determine the damages to which the Plaintiffs are
14 entitled. You should not interpret the fact that I am giving
15 instructions about the Plaintiffs' damages as an indication in
16 any way that I believe the Plaintiffs should, or should not,
17 win this case. It is your task to decide whether any Defendant
18 is liable. I am instructing you on damages only so that you
19 will have guidance in the event you decide that any Defendant
20 is liable and that the Plaintiffs are entitled to recover money
21 from any Defendant.

22 ZeniMax and id Software must prove damages by a
23 preponderance of the evidence. ZeniMax and id Software may
24 recover for any actual losses they suffered because of the
25 infringement, plus any profits that Defendants made from the

1 infringement to the extent not taken into account in
2 Plaintiffs' losses. I will define these terms in the following
3 instructions.

4 Examples of actual losses from copyright infringement
5 can include the profits that ZeniMax and id Software prove they
6 would have made without the infringement. Profits are the
7 revenue ZeniMax and id Software would have made on sales they
8 would have made without the infringement, less any additional
9 expenses ZeniMax and id Software would have incurred in making
10 the sales.

11 Actual losses can also be measured by determining a
12 "reasonable royalty." with respect to their copyright
13 infringement claim, a "reasonable royalty" would measure the
14 royalty that would have resulted from a hypothetical arm's
15 length negotiation between a willing buyer and ZeniMax and
16 id Software to obtain a license to copy and use ZeniMax and id
17 Software's copyrighted works.

18 Determining a reasonable royalty from a hypothetical
19 license price requires an objective, not a subjective, analysis
20 of the fair market value of the license, and excessively
21 speculative claims must be rejected. An objective
22 non-speculative license price could be established through
23 objective evidence of Benchmark transactions.

24 In addition to recovering for its actual losses, if
25 any, ZeniMax and id Software are entitled to recover the

1 profits that Defendants made because of the infringement.
 2 Defendants' profits are recoverable, however, only to the
 3 extent that you have not taken them into account in determining
 4 ZeniMax and id Software's actual losses.

5 Defendants' profits are revenues that Defendants made
 6 because of the infringement minus their expenses in developing,
 7 producing, distributing, marketing, and selling their computer
 8 programs.

9 ZeniMax and id Software need only prove Defendants'
 10 revenues. Defendants must prove their own expenses and any
 11 portion of their profits that resulted from factors other than
 12 infringement of ZeniMax and id Software's copyrights.

13 4. Copyright Infringement: Jury Questions

14 QUESTION 7:

15 Did any of the following Defendants directly infringe
 16 upon any of ZeniMax or id Software's copyrights?

17 Answer "Yes" or "No" for each Defendant:

18 Oculus: _____

19 Facebook: _____

20 Palmer Luckey: _____

21 John Carmack: _____

22 Put yes or no beside each, whatever you find.

23 QUESTION 8:

24 Did any of the following Defendants vicariously
 25 infringe upon any of ZeniMax or id Software's copyrights?

1 Answer "Yes" or "No" for each Defendant:

2 Oculus: _____

3 Facebook: _____

4 Palmer Luckey: _____

5 Brendan Iribe: _____

6 John Carmack: _____

7 Yes or no for each of those and there are blanks
8 there.

9 QUESTION 9:

10 Did any of the following Defendants contributorily
11 infringe upon any of ZeniMax or id Software's copyrights?

12 Answer "Yes" or "No" for each Defendant:

13 Oculus: _____

14 Facebook: _____

15 Palmer Luckey: _____

16 Brendan Iribe: _____

17 John Carmack: _____

18 Yes or no beside each name, whatever the appropriate
19 answer.

20 QUESTION 10:

21 If you answered "Yes" to Question 7, 8, or 9 for
22 Brendan Iribe and/or John Carmack, answer this question for
23 each of these Defendants that you answered "Yes" in Question 7,
24 8, or 9. Otherwise, do not answer this question and skip to
25 Question 12.

1 Do you find that of all ZeniMax and id Software's
2 claims for copyright infringement against John Carmack and/or
3 Brendan Iribe are barred by the statute of limitations?

4 Answer "Yes" or "No" for each Defendant:

5 Brendan Iribe: Yes or no.

6 John Carmack: Yes or no.

7 QUESTION 11:

8 If you answered "No" to Question 10 for Brendan Iribe
9 and/or John Carmack, answer this question for each of these
10 Defendants that you answered "No" in Question 10. Otherwise,
11 do not answer this question and skip to Question 12.

12 Do you find that of a portion of ZeniMax and id
13 Software's claims for copyright infringement against John
14 Carmack and/or Brendan Iribe is barred by the statute of
15 limitations?

16 Answer "Yes" or "No" for each Defendant:

17 Brendan Iribe: _____

18 John Carmack: _____

19 QUESTION 12:

20 If you answered "Yes" to any part of Questions 7, 8,
21 or 9 then answer this question for each Defendant that you
22 answered "Yes" in Question 7, 8, or 9. Otherwise, do not
23 answer this question and skip to Question 15.

24 Do you find that the doctrine of laches bars ZeniMax
25 and id Software's claim for copyright infringement?

1 Answer "Yes" or "No" for each Defendant:

2 Oculus: _____

3 Facebook: _____

4 Palmer Luckey: _____

5 Brendan Iribe: _____

6 John Carmack: _____

7 Answer yes or no beside each, whichever is the right
8 answer.

9 QUESTION 13:

10 If you answered "Yes" to any part of Questions 7, 8,
11 or 9 then answer this question for each Defendant that you
12 answered "Yes" in Question 7, 8, or 9. Otherwise, do not
13 answer this question and skip to Question 15.

14 Do you find that either of the defenses of license or
15 de minimis use bars ZeniMax's claim for copyright infringement.

16 Answer "Yes" or "No" for each Defendant:

17 Oculus: _____

18 Facebook: _____

19 Palmer Luckey: _____

20 Brendan Iribe: _____

21 John Carmack: _____

22 Yes or no beside each appropriately.

23 QUESTION 14:

24 Only answer this question for each Defendant that you
25 answered "Yes" in Questions 7, 8, or 9 and also answered "No"

1 in Questions 10, 12, or 13. For Brendan Iribe and John
 2 Carmack, if you answered "Yes" to Question 11 for these
 3 Defendants, only include actual damages and/or profits, if any,
 4 that are based on the portion of ZeniMax and id Software's
 5 copyright infringement claims that are not barred by the
 6 statute of limitations.

7 1. What amount of actual damages, if any, did
 8 ZeniMax and id Software suffer as a result of the infringement
 9 by each of the Defendants that you found in response to
 10 Questions 7, 8, or 9?

11 Answer in dollars and cents, if any, in those
 12 appropriate lines.

13 2. What amount of profits, if any, do you find that
 14 Defendants earned as a result of that infringement that was not
 15 taken into account in computing any of ZeniMax and id
 16 Software's actual damages?

17 Answer in dollar and cents, if any.

18 Oculus: \$ _____

19 Facebook: \$ _____

20 Palmer Luckey: \$ _____

21 Brendan Iribe: \$ _____

22 John Carmack: \$ _____

23 C. ZeniMax and id Software's Breach of Contract Claim

24 1. Breach of Contract: Liability

25 ZeniMax and id Software also allege that they had a

1 contract - the Nondisclosure Agreement - with Defendants Palmer
2 Luckey and Oculus.

3 To succeed on their breach of contract claim, ZeniMax
4 and id Software must prove the following things by a
5 preponderance of the evidence:

6 1. The existence of a valid, enforceable contract
7 between Plaintiffs and Defendant Mr. Luckey and/or Oculus;

8 2. Plaintiffs performed their obligations under that
9 contract;

10 3. Defendant Mr. Luckey and/or Oculus breached that
11 contract; and

12 4. Plaintiffs sustained damages as a result of that
13 breach.

14 ZeniMax and id Software must first prove by a
15 preponderance of the evidence that such a contract existed and
16 who are the parties to the contract. In deciding whether the
17 parties reach an agreement, you may consider what they said and
18 did in light of the surrounding circumstances, including any
19 earlier course of dealing. You may not consider the parties'
20 unexpressed thoughts or intentions.

21 You must also consider who is a party to the
22 contract, if any. In particular, Oculus disputes that it is a
23 party to the Nondisclosure Agreement. There are a number of
24 ways by which you might find that Oculus is a party to that
25 agreement:

1 1. Oculus will be bound to the Nondisclosure
2 Agreement if you find that Oculus is a "mere continuation" of
3 Luckey's prior business. A business that takes over assets
4 from a prior business, whether that prior business be a
5 corporation or sole proprietor, may succeed to the prior
6 business's rights and obligations when the new business is a
7 mere continuation of the prior business. In determining
8 whether Oculus is a mere continuation of Palmer Luckey's
9 business you may consider two factors. First, if Palmer Luckey
10 was fully paid for the assets of his prior business, that would
11 tend to show that the new business was not a mere continuation.
12 If, however, you find that Mr. Luckey was not fully paid for
13 the assets of his prior business that would tend to show that
14 Oculus was a mere continuation. Second, if you find that one
15 or more persons were officers, directors, or key employees of
16 both Mr. Luckey's prior business and Oculus, that would also
17 tend to show that the new business was a mere continuation.

18 1. Oculus will be bound to the Nondisclosure
19 Agreement if you find that Oculus is a "mere continuation" of
20 Luckey's prior business. A business that takes over assets
21 from a prior business, whether that prior business be a
22 corporation or sole proprietor, may succeed to the prior
23 business's rights and obligations when the new business is a
24 mere continuation of the prior business. In determining
25 whether Oculus is a mere continuation of Palmer Luckey's

1 business you may consider two factors. First, if Palmer Luckey
2 was fully paid for the assets of his prior business, that would
3 tend to show that the new business was not a mere continuation.
4 If, however, you find that Mr. Luckey was not fully paid for
5 the assets of his prior business that would tend to show that
6 Oculus was a mere continuation. Second, if you find that one
7 or more persons were officers, directors, or key employees of
8 both Mr. Luckey's prior business and Oculus, that would also
9 tend to show that the new business was a mere continuation.

10 2. Oculus will be bound to the Nondisclosure
11 Agreement if you find that Oculus manifested acceptance of the
12 Nondisclosure Agreement through its conduct. By this we ask:
13 was there an implied agreement between Oculus and Plaintiffs
14 that Oculus would be bound to the Nondisclosure Agreement? An
15 implied agreement is one whose existence and terms are shown by
16 conduct rather than by words. Such an agreement may arise from
17 the parties' conduct and course of dealing if it demonstrates
18 that their minds met on the terms of the agreement. A contract
19 implied from the facts and circumstances in evidence is as
20 binding as would be an expressed one. Accordingly, in deciding
21 whether the parties reached an agreement through their conduct,
22 you may consider their conduct in light of the surrounding
23 circumstances, including any course of dealing. You may not
24 consider the parties' unexpressed thoughts or intentions.

25 3. Oculus will be bound to the Nondisclosure

1 Agreement if you find that Mr. Luckey assigned his obligations
2 under that agreement under a theory of quasi-estoppel. This
3 principle prevents a party from asserting, to another's
4 disadvantage, a right inconsistent with a position previously
5 taken by that party. The doctrine applies where it would be
6 unconscionable to allow a party to maintain a position
7 inconsistent with one in which they acquiesced, or of which
8 they previously accepted a benefit.

9 ZeniMax and id Software must lastly prove by a
10 preponderance of the evidence that Luckey and/or Oculus
11 breached the Nondisclosure Agreement and that Plaintiffs
12 suffered damages as a result.

13 2. Breach of Contract: Defenses

14 Defendants assert that if they failed to comply with
15 the contract then this failure is excused. Failure to comply
16 with a term in an agreement is excused if the parties agreed,
17 verbally or through their course of performance, that a new or
18 different term would take its place. In making this
19 determination, you may consider whether the contract involved
20 repeated occasions for performance of the term by one party and
21 whether the other party, with knowledge of the nature of the
22 party's performance, accepted or otherwise acquiesced in the
23 performance by the party. You may also consider whether the
24 parties had a common basis of understanding for interpreting
25 their expressions and other conduct.

1 Defendants Mr. Luckey and Oculus also contend that
2 they are not liable for breach of contract because of the
3 doctrine of laches, which we have already discussed. Laches is
4 an equitable defense with three elements: (1) delay in
5 asserting a right or claim; (2) the delay was not excusable;
6 and (3) there was undue prejudice to the party against whom the
7 claim is asserted.

8 Two kinds of prejudice may support a defense of
9 laches: (1) the delay has resulted in the loss of evidence; or
10 (2) the defendant has changed his position in a way that would
11 not have occurred if the plaintiff had not delayed. Defendants
12 have the burden of proving the laches defense by a
13 preponderance of the evidence.

14 A party asserting the defense of laches must have
15 "clean hands": That is, the party must have acted fairly and
16 without fraud or deceit as to the controversy in issue. If you
17 find that a Defendant has unclean hands, then you should not
18 find that Defendant has established the defense of laches.

19 Defendants Mr. Luckey and Oculus also assert as a
20 defense that they were excused from technical compliance with
21 the Nondisclosure Agreement because Zencia waived its rights
22 under the Nondisclosure Agreement.

23 waiver is an intentional surrender of a known right
24 or intentional conduct inconsistent with claiming the right.
25 If you find by a preponderance of the evidence that ZeniMax

1 intentionally surrendered its rights under the Nondisclosure
2 Agreement or intentionally conducted itself in ways that were
3 inconsistent with claiming the rights that ZeniMax asserts it
4 held under the Nondisclosure Agreement, then your verdict
5 should be for Defendants Mr. Luckey and Oculus on this claim.

6 3. Breach of Contract: Damages

7 Should you find that ZeniMax and id Software have
8 proven their breach of contract claim, you must compensate them
9 with a sum of money, if paid now in cash, that would fairly and
10 reasonably compensate Plaintiffs for their damages that were
11 proximately caused by Mr. Luckey's and/or Oculus's breach of
12 any agreement they had with Plaintiffs relating to the
13 Nondisclosure Agreement.

14 You should not interpret the fact that I am giving
15 instructions about damages as an indication in any way that I
16 believe the Plaintiffs should, or should not, prevail on this
17 claim. It is your task to decide whether Defendants Mr. Luckey
18 and/or Oculus are liable. I am instructing you on damages only
19 so that you will have guidance in the event you decide that
20 either Defendant is liable and that ZeniMax and id Software are
21 entitled to recover money.

22 If you decide so, the Plaintiffs are entitled to
23 recover their direct damages, which are those damages which
24 naturally and necessarily flow from the breach, if any, and
25 consequential damages, which are those damages that are the

1 natural, probable, and foreseeable consequence of the breach,
 2 if any. If you award any contract damages, those damages
 3 should be measured at the time of the breach and not at the
 4 time of trial.

5 Damages awarded must be proximately caused by the
 6 Defendants' failure to comply with the Nondisclosure Agreement.
 7 Proximate cause means a cause that was a substantial factor in
 8 bringing about an event, and without which cause such event
 9 would not have occurred. In order to be a proximate cause, the
 10 act or omission complained of must be such that a person using
 11 the degree of care required of him would have foreseen that the
 12 event, or some similar event, might reasonably result
 13 therefrom. There may be more than one proximate cause of an
 14 event.

15 4. Breach of Contract: Jury Questions

16 QUESTION 15:

17 Did Palmer Luckey fail to comply with the
 18 Nondisclosure Agreement?

19 Answer "Yes" or "No." _____

20 QUESTION 16:

21 Only answer this question if you answered "Yes" to
 22 Question 15. Otherwise, do not answer this question and skip
 23 to Question 19.

24 Do you find that the doctrine of laches bars ZeniMax
 25 and id Software's breach of contract claim against Palmer

1 Luckey?

2 Answer "Yes" or "No": _____

3 QUESTION 17:

4 Only answer this question if you answered "Yes" to
5 Question 15. Otherwise, do not answer this question and skip
6 to Question 19.

7 Do you find that the doctrine of waiver bars ZeniMax
8 and id Software's breach of contract claim against Palmer
9 Luckey?

10 Answer "Yes" or "No": _____

11 QUESTION 18:

12 Only answer this question if you answered "Yes" to
13 Question 15. Otherwise, do not answer this question and skip
14 to Question 19.

15 Do you find that Palmer Luckey's failure to comply
16 was excused?

17 Answer "Yes" or "No": _____

18 QUESTION 19:

19 Do you find that Oculus is a party to the document
20 entitled "Nondisclosure Agreement" dated May 24, 2012 because
21 Oculus is a mere continuation of Palmer Luckey?

22 Answer "Yes" or "No." _____

23 QUESTION 20:

24 Do you find that Oculus is a party to the document
25 entitled "Nondisclosure Agreement" dated May 24, 2012 because

1 Oculus manifested its acceptance of that agreement through its
2 conduct?

3 Answer "Yes" or "No." _____

4 QUESTION 21:

5 Do you find that Oculus is a party to the document
6 entitled "Nondisclosure Agreement" dated May 24, 2012 because
7 Palmer Luckey assigned his obligations under that agreement to
8 Oculus under a theory of quasi-estoppel?

9 Answer "Yes" or "No." _____

10 QUESTION 22:

11 Only answer this question if you answered "Yes" to
12 Question 19, 20, or 21. Otherwise, do not answer this question
13 and skip to Question 26.

14 Did Oculus fail to comply with the Nondisclosure
15 Agreement?

16 Answer "Yes" or "No." _____

17 QUESTION 23:

18 Only answer this question if you answered "Yes" to
19 Question 22. Otherwise, do not answer this question and skip
20 to Question 26.

21 Do you find that the doctrine of laches bars ZeniMax
22 and id Software's breach of contract claim against Oculus?

23 Answer "Yes" or "No: _____

24 QUESTION 24:

25 Only answer this question if you answered "Yes" to

1 Question 22. Otherwise, do not answer this question and skip
2 to Question 26.

3 Do you find that the doctrine of waiver bars ZeniMax
4 and id Software's breach of contract claim against Oculus?

5 Answer "Yes" or "No": _____

6 QUESTION 25:

7 Only answer this question if you answered "Yes" to
8 Question 22. Otherwise, do not answer this question and skip
9 to Question 26.

10 Do you find that Oculus' failure to comply was
11 excused?

12 Answer "Yes" or "No": _____

13 QUESTION 26:

14 Only answer this question if you answered "Yes" to
15 Question 15 and "No" to Question 16, Question 17, and Question
16 18. Otherwise, do not answer this question and skip to
17 Question 27.

18 What sum of money, if paid now in cash, would fairly
19 and reasonably compensate ZeniMax and id Software for their
20 injuries that resulted from Palmer Luckey's failure to comply
21 with the Nondisclosure Agreement?

22 Do not add any amount for interest on damages, if
23 any.

24 Answer in dollars and cents as to damages, if any,
25 that were sustained by ZeniMax and id Software in the past:

1 Answer: \$ _____

2 Answer in dollars and cents as to damages, if any,
3 that ZeniMax and id Software, in reasonable probability, will
4 sustain in the future:

5 Answer: \$ _____

6 QUESTION 27:

7 Only answer this question if you answered "Yes" to
8 Question 22 and "No" to Question 23, Question 24, and Question
9 25. Otherwise, do not answer this question and skip to
10 Question 28.

11 What sum of money, if paid now in cash, would fairly
12 and reasonably compensate ZeniMax and id Software for their
13 injuries that resulted from Oculus's failure to comply with the
14 agreement?

15 Do not add any amount for interest on damages, if
16 any.

17 Answer in dollars and cents as to damages, if any,
18 that were sustained by ZeniMax and id Software in the past:

19 Answer: \$ _____

20 Answer in dollars and cents as to damages, if any,
21 that ZeniMax and id Software, in reasonable probability, will
22 sustain in the future:

23 Answer: \$ _____.

24 D. Tortious Interference with Contract.

25 1. Tortious Interference with Contract: Liability

1 ZeniMax and id Software have made a claim that
2 Facebook has tortiously interfered with its Nondisclosure
3 Agreement with Mr. Luckey and/or Oculus.

4 In order to establish a tortious interference with
5 contract claim, the Plaintiffs must prove by a preponderance of
6 the evidence:

7 1) a contract existed between ZeniMax and id Software
8 on the one hand and Mr. Luckey and/or Oculus on the other that
9 was subject to interference;

10 2) Defendant Facebook willfully and intentionally
11 interfered with the contract;

12 3) the act of interference was a proximate cause of
13 damage to ZeniMax and id Software; and

14 4) ZeniMax and id Software suffered actual damage or
15 loss.

16 Interference is "intentional" if committed with the
17 desire to induce the breach of the contract or with the belief
18 that interference is substantially certain to result.

19 Interference can include conduct that prevents performance of a
20 contract or makes performance of a contract impossible, more
21 burdensome, or more difficult or of less or no value to the one
22 entitled to performance.

23 The Defendant's intentional making of a contract with
24 a party and proceeding to carry out such contract, knowing that
25 the party's performance of its contract with the Defendant

1 would be contrary to and in violation of the party's contract
2 with the Plaintiffs, may be used to show the Defendant's
3 inducement of the breach.

4 2. Tortious Interference with Contract: Defenses

5 Defendant Facebook contends that it is not liable for
6 breach of tortious interference with contract because of the
7 doctrine of laches, which we have already discussed. Laches is
8 an equitable defense with three elements: (1) delay in
9 asserting a right or claim; (2) the delay was not excusable;
10 and (3) there was undue prejudice to the party against whom the
11 claim is asserted.

12 Two kinds of prejudice may support a defense of
13 laches: (1) the delay has resulted in the loss of evidence; or
14 (2) the defendant has changed his position in a way that would
15 not have occurred if the plaintiff had not delayed. Defendant
16 has the burden of proving the laches defense by a preponderance
17 of the evidence.

18 A party asserting the defense of laches must have
19 "clean hands": That is, the party must have acted fairly and
20 without fraud or deceit as to the controversy in issue. If you
21 find that a Defendant has unclean hands, then you should not
22 find that Defendant has established the defense of laches.

23 3. Tortious Interference with Contract: Damages

24 If you find that Facebook tortiously interfered with
25 ZeniMax's Nondisclosure Agreement with Mr. Luckey and/or

1 Oculus, then you must determine whether such interference
2 proximately caused ZeniMax's damages, and, if so, what sum of
3 money would fairly and reasonably compensate ZeniMax for their
4 damages. The measure of damages for tortious interference with
5 contract is the same as for breach of contract.

6 Damages awarded must be proximately caused by the
7 Defendants' failure to comply with the Nondisclosure Agreement.
8 Proximate cause means a cause that was a substantial factor in
9 bringing about an event, and without which cause such event
10 would not have occurred. In order to be a proximate cause, the
11 act or omission complained of must be such that a person using
12 the degree of care required of him would have foreseen that the
13 event, or some similar event, might reasonably result
14 therefrom. There may be more than one proximate cause of an
15 event.

16 Plaintiffs also contend that the Facebook was
17 unjustly enriched in connection with its act of tortious
18 interference with contract. Unjust enrichment is an equitable
19 principle holding that one who unjustly receives benefits
20 should make restitution for those benefits, and is typically
21 found where one person has obtained a benefit from another by
22 fraud, duress, or taking of an undue advantage or has passively
23 accepted benefits that it would be unjust for that person to
24 retain.

25 If you find that Facebook was unjustly enriched by

1 its act of tortious interference with contract and should make
2 restitution for any property or benefits they may have
3 received, you should award that amount of money against
4 Facebook and in favor of Plaintiffs.

5 4. Tortious Interference with Contract: Jury
6 Questions

7 QUESTION 28:

8 Did Facebook tortiously interfere with ZeniMax and id
9 Software's contract with Palmer Luckey and/or Oculus?

10 Answer "Yes" or "No." _____

11 QUESTION 29:

12 Answer this question if you answered "Yes" to
13 Question 28. Otherwise, do not answer this question and skip
14 to Question 31.

15 Do you find that the doctrine of laches bars ZeniMax
16 and id Software's claim for tortious interference against
17 Facebook?

18 Answer "Yes" or "No." _____

19 QUESTION 30:

20 Answer this question if you answered "Yes" to
21 Question 28 and "No" to Question 29. Otherwise, do not answer
22 this question and skip to Question 31.

23 what sum of money, if paid now in cash, would fairly
24 and reasonably compensate ZeniMax and id Software for their
25 damages, if any, proximately caused by such interference?

1 Do not add any amount for interest on damages, if
2 any.

3 Answer in dollars and cents as to damages that were
4 sustained by ZeniMax and id Software in the past:

5 Answer: \$ _____

6 Answer in dollars and cents as to damages that ZeniMax and id
7 Software, in reasonable probability, will sustain in the
8 future:

9 Answer: \$ _____

10 E. Unfair Competition

11 1. Unfair Competition: Liability

12 ZeniMax and id Software claim that Defendants Oculus
13 and Facebook engaged in "unfair competition" with respect to
14 ZeniMax and id Software's contracts, copyrights, trademarks,
15 and/or trade secrets. "Unfair competition" is a form of
16 unlawful business injury arising out of business conduct which
17 is contrary to honest practice in industrial or commercial
18 matters. That is, while the law protects and encourages
19 competition between businesses, that competition must be fair
20 and must not run contrary to accepted business ethics. A claim
21 of unfair competition requires that the Plaintiffs show an
22 illegal act by the Defendants that interfered with the
23 Plaintiffs' ability to conduct their business. The illegal act
24 need not necessarily violate criminal law, but must at least be
25 an independent wrong.

1 In order to prove that Oculus committed an "illegal
2 act" for purposes of Plaintiffs' unfair competition claim,
3 ZeniMax and id Software must prove one of the following: That
4 Oculus (1) misappropriated Plaintiffs' trade secrets; (2)
5 infringed Plaintiffs' copyrights; (3) infringed Plaintiffs'
6 trademarks; or (4) breached a contract it had with Plaintiffs.

7 In order to prove that Facebook committed an "illegal
8 act" for purposes of Plaintiffs' unfair competition claim,
9 ZeniMax and id Software must prove one of the following: That
10 Facebook (1) misappropriated Plaintiffs' trade secrets; (2)
11 infringed Plaintiffs' copyrights; or (3) tortiously interfered
12 with the Nondisclosure Agreement.

13 In order to prevail on its unfair competition claim,
14 ZeniMax and id Software must then prove by a preponderance of
15 the evidence that Oculus' or Facebook's illegal act interfered
16 with ZeniMax and id Software's ability to conduct their
17 business.

18 2. Unfair Competition: Defenses

19 Defendants Facebook and Oculus contend that they are
20 not liable for unfair competition because of the doctrine of
21 laches, which we have already discussed. Laches is an
22 equitable defense with three elements: (1) delay in asserting a
23 right or claim; (2) the delay was not excusable; and (3) there
24 was undue prejudice to the party against whom the claim is
25 asserted.

1 Two kinds of prejudice may support a defense of
2 laches: (1) the delay has resulted in the loss of evidence; or
3 (2) the defendant has changed his position in a way that would
4 not have occurred if the plaintiff had not delayed. Defendants
5 have the burden of proving the laches defense by a
6 preponderance of the evidence.

7 A party asserting the defense of laches must have
8 "clean hands": That is, the party must have acted fairly and
9 without fraud or deceit as to the controversy in issue. If you
10 find that a Defendant has unclean hands, then you should not
11 find that Defendant has established the defense of laches.

12 3. Unfair Competition: Damages

13 If you find that Defendants are liable to Plaintiffs
14 ZeniMax and id Software under Plaintiffs' unfair competition
15 claim, then you must determine an amount that is fair
16 compensation for all of Plaintiffs' damages. These damages are
17 called compensatory damages.

18 The purpose of compensatory damages is to make
19 Plaintiffs whole that is, to compensate Plaintiffs for the
20 damage that they have suffered. Compensatory damages are not
21 limited to expenses that Plaintiffs may have incurred because
22 of their injury.

23 The fact that I am giving you instructions concerning
24 damages relating to ZeniMax and id Software's unfair
25 competition claim does not mean that I think ZeniMax and id

1 Software have established the elements of that claim or that I
2 believe that ZeniMax and id Software should or should not
3 prevail on this claim.

4 You should not award damages for ZeniMax's unfair
5 competition claim that you already took into account with
6 regard to ZeniMax's other claims. You may award compensatory
7 damages only for injuries that Plaintiffs prove were
8 proximately caused by Defendants' allegedly wrongful conduct.
9 Proximate cause means a cause that was a substantial factor in
10 bringing about an event, and without which cause such event
11 would not have occurred. In order to be a proximate cause, the
12 act or omission complained of must be such that a person using
13 the degree of care required of him would have foreseen that the
14 event, or some similar event, might reasonably result
15 therefrom. There may be more than one proximate cause of an
16 event.

17 The damages that you award must be fair compensation
18 for all of Plaintiffs' damages, no more and no less. You
19 should not award compensatory damages for speculative injuries,
20 but only for those injuries that Plaintiffs have actually
21 suffered.

22 If you decide to award compensatory damages, you
23 should be guided by dispassionate common sense. Computing
24 damages may be difficult, but you must not let that difficulty
25 lead you to engage in arbitrary guesswork. On the other hand,

1 the law does not require that Plaintiffs prove the amount of
2 their losses with mathematical precision, but only with as much
3 definiteness and accuracy as the circumstances permit. You
4 must use sound discretion in fixing an award of damages,
5 drawing reasonable inferences where you find them appropriate
6 from the facts and circumstances in evidence. Do not add any
7 amount of interest on damages, if any.

8 If you find the Facebook and Oculus were unjustly
9 enriched by their act of unfair competition and should make
10 restitution for any property or benefits they may have
11 received, you should award that amount of money against
12 Facebook and Oculus and in favor of Plaintiffs.

13 4. Unfair Competition: Jury Questions

14 Oculus have one "C" or two?

15 MS. WILKINSON: One.

16 THE COURT: One.

17 MS. WILKINSON: Yes, sir.

18 THE COURT: We misspelled it. I'm going to correct
19 it.

20 I assume nobody has any objection to me doing that?
21 Hello?

22 MR. SAMMI: No.

23 MS. WILKINSON: No objection.

24 MR. SAMMI: No objection.

25 THE COURT: Thank you.

1 4. Unfair Competition: Jury Questions

2 QUESTION 31:

3 Did Defendants Facebook and/or Oculus engage in
4 unfair competition against ZeniMax and id Software?

5 Answer "Yes" or "No" for each Defendant:

6 Facebook: _____

7 Oculus: _____

8 QUESTION 32:

9 If you answered "Yes" to any part of Question 31,
10 then answer this question for each Defendant that you answered
11 "Yes" in Question 31. Otherwise, do not answer this question
12 and skip to Question 35.

13 Do you find that the doctrine of laches bars ZeniMax
14 and id Software's claim for unfair competition?

15 Answer "Yes" or "No" for each Defendant:

16 Facebook: _____

17 Oculus: _____

18 QUESTION 33:

19 Answer this question if you answered "Yes" to
20 Question 31 for any Defendant and also answered "No" to
21 Question 32 for that Defendant. Otherwise, do not answer this
22 question and skip to Question 35.

23 What amount of damages, if any, did Zenimax and id
24 Software prove were proximately caused by Defendants' unfair
25 competition?

1 Answer in dollars and cents, if any.

2 \$ _____

3 QUESTION 34:

4 Answer this question if you assessed damages in
5 Question 33. Otherwise do not answer this question and skip to
6 Question 35.

7 For each person you found caused or contributed to
8 cause the damages to Plaintiffs, find the percentage of
9 responsibility attributable to each. Assign percentages of
10 responsibility only to those Defendants you found caused or
11 contributed to cause the damages for unfair competition. The
12 percentages you find must total 100 percent. The percentages
13 must be expressed in whole numbers. The percentage of
14 responsibility attributable to any one is not necessarily
15 measured by the number of acts or omissions --

16 we misspelled "omissions." Let's see. Omissions
17 is -- are there two "M's" or one "M" in omissions?

18 And one "I" and then another "I."

19 Okay. I am making that correction. I am making that
20 correction even if y'all object. I got to get it right.

21 And I'm assuming you don't object, correct?

22 MR. SAMMI: No objection.

23 MS. WILKINSON: No objection.

24 THE COURT: And then Facebook and Oculus, a
25 percentage of that, and then total 100 percent.

1 F. Conversion.

2 1. Conversion: Liability

3 Plaintiffs ZeniMax and id Software also contend that
4 Defendant John Carmack converted ZeniMax and id Software's
5 property. The term "converted" generally means that one
6 wrongfully exercised control over another's property. Here,
7 ZeniMax and id Software contend that Mr. Carmack converted
8 their property.

9 To prevail on their conversion claim, ZeniMax and id
10 Software must prove, by a preponderance of the evidence, each
11 of the following:

12 1) Plaintiffs owned, had legal possession of, or were
13 entitled to possession of the property;

14 2) Mr. Carmack, unlawfully and without authorization,
15 assumed and exercised dominion and control over the property to
16 the exclusion of, or inconsistent with, Plaintiffs' rights;

17 3) Plaintiffs made a demand for the property; and

18 4) Mr. Carmack refused to return the property.

19 2. Conversion: Defenses

20 Mr. Carmack asserts as a defense that the statute of
21 limitations bars ZeniMax and id Software's claim for Mr.
22 Carmack's conversion.

23 A statute of limitations is a law that provides that
24 a suit is barred if a plaintiff does not bring it within a
25 prescribed period of time. The time period within which a

1 lawsuit for alleged conversion must be brought begins when
2 ZeniMax and id Software first discovered, or by the exercise of
3 reasonable diligence should have discovered, the facts that
4 form the basis of its alleged conversion claim.

5 The applicable statute of limitations period for
6 conversion is two years. For the purposes of the statute of
7 limitations, you may consider the suit against Mr. Carmack as
8 being filed on March 31, 2016. Mr. Carmack must prove by a
9 preponderance of the evidence that ZeniMax and id Software did
10 not bring their claim for conversion within the applicable time
11 period.

12 Mr. Carmack contends that he is not liable for
13 conversion because of the doctrine of laches, which we have
14 already discussed. Laches is an equitable defense with three
15 elements: (1) delay in asserting a right or claim; (2) the
16 delay was not excusable; and (3) there was undue prejudice to
17 the party against whom the claim is asserted.

18 Two kinds of prejudice may support a defense of
19 laches: (1) the delay has resulted in the loss of evidence; or
20 (2) the defendant has changed his position in a way that would
21 not have occurred if the plaintiff had not delayed. Defendants
22 have the burden of proving the laches defense by a
23 preponderance of the evidence.

24 A party asserting the defense of laches must have
25 "clean hands": That is, the party must have acted fairly and

1 without fraud or deceit as to the controversy in issue. If you
2 find that a Defendant has unclean hands, then you should not
3 find that Defendant has established the defense of laches.

4 3. Conversion: Jury Questions

5 QUESTION 35:

6 Did Defendant John Carmack convert ZeniMax and id
7 Software's property?

8 Answer "Yes" or "No" for each item:

9 ZeniMax's documents on USB drive: _____

10 RAGE code: _____

11 QUESTION 36:

12 If you answered "Yes" to any part of Question 35,
13 answer this question for the items for which you answered "Yes"
14 in Question 35. Otherwise, do not answer this question and
15 skip to Question 38.

16 Do you find that the statute of limitations bars
17 ZeniMax and id Software's claim for conversion against John
18 Carmack?

19 Answer "Yes" or "No" for each item:

20 ZeniMax's documents on USB drive: _____

21 RAGE code: _____

22 QUESTION 37:

23 If you answered "Yes" to any part of Question 35,
24 answer this question for the items for which you answered "Yes"
25 in Question 35. Otherwise, do not answer this question and skip

1 to Question 38.

2 Do you find that the doctrine of laches bars ZeniMax
3 and id Software's claim for conversion?

4 Answer "Yes" or "No" for each item:

5 ZeniMax's documents on USB drive: _____

6 RAGE code: _____

7 G. Trademark Infringement and False Designation

8 1. Trademark Infringement and False Designation:
9 Liability

10 Plaintiffs ZeniMax and id Software also claim that
11 Defendants Oculus, Mr. Luckey, and Mr. Iribe have infringed
12 Plaintiffs' trademarks. A trademark is a word, symbol, or
13 combination of words or symbols used by a person to identify
14 his product, to distinguish his product from those manufactured
15 or sold by others, and to indicate the source of his product.
16 I will sometimes refer to a "trademark" simply as a "mark."

17 The purpose of trademark law is to prevent confusion
18 among consumers about the source of products and to permit
19 trademark owners to show ownership of their products and
20 control their product's reputation.

21 In order to establish trademark infringement, ZeniMax
22 must prove by a preponderance of the evidence that:

- 23 1) ZeniMax owned legally protectable trademarks; and
24 2) Defendants Oculus, Mr. Luckey, and/or Mr. Iribe
25 used one or more of the ZeniMax's trademarks, without ZeniMax's

1 consent, in connection with the offer of products in a manner
2 that was likely to cause confusion as to the source,
3 affiliation, or sponsorship of the products.

4 The parties do not dispute that ZeniMax owned legally
5 protectable trademarks. In this case ZeniMax asserts the
6 following trademarks:

- 7 1) The "DOOM" name,
- 8 2) The "DOOM 3" name,
- 9 3) The "DOOM II" name and design
- 10 4) The "ID" name,
- 11 5) The "RAGE" name and design -- and there's the
12 design,
- 13 6) The "SKYRIM" name,

14 Likelihood of confusion means a probability of
15 confusion, which is more than a mere possibility of confusion.
16 It is not necessary that the mark used by Defendants be an
17 exact copy of Plaintiffs' marks. Rather, Plaintiffs must
18 demonstrate that, when viewed in its entirety, the marks used
19 by Defendants are likely to cause confusion in the minds of
20 reasonably prudent purchasers or users as to the source of the
21 product in question.

22 In evaluating whether or not there is a likelihood of
23 confusion, you are to consider various factors, including:

- 24 1) Strength or weakness of Plaintiffs' mark. Strong
25 marks receive a broad level of protection under the trademark

1 laws; weak marks receive a narrower range of protection. In
2 evaluating the strength of Plaintiffs' mark, you should not
3 rely solely on the fact that Plaintiffs have a registered
4 trademark as an indicator of strength. A mark's strength is
5 measured by both its inherent strength (how distinctive it is)
6 and by its acquired strength (the degree of consumer
7 recognition it has obtained in the marketplace). The more that
8 purchasers or users associate Plaintiffs' trademark uniquely
9 with a single source of a product, then the stronger
10 Plaintiffs' mark.

11 2) Degree of similarity or dissimilarity between the
12 two marks. In evaluating the similarity or dissimilarity of
13 the respective marks, each mark must be considered as a whole.
14 Likelihood of confusion cannot be based on dissection of a
15 mark, that is, on only part of a mark. Although there is
16 nothing improper in giving more or less weight to a particular
17 feature of a mark, the ultimate conclusion as to the similarity
18 or dissimilarity of the marks must rest on consideration of the
19 marks in their entirety. You should consider the overall
20 impression created by the marks, keeping in mind all the things
21 that the general buying public will likely perceive and
22 remember about the marks, including their similarities in
23 sight, sound, and meaning, as well as designs, fonts, colors,
24 and other elements.

25 3) Similarity of the parties' products. If both

1 Plaintiffs and Defendants use their marks to market the same,
2 related, or complementary types of products, then the
3 likelihood of confusion increases. If the parties' respective
4 products are unrelated, then the likelihood of confusion
5 decreases.

6 4) Outlet and Purchaser Identity. If purchasers and
7 purchasing outlets for the Defendants' and Plaintiffs' products
8 are the same, there may be a greater likelihood of confusion
9 about the source of goods than otherwise.

10 5) Advertising Media Identity. If Defendants and
11 Plaintiffs advertise, market, and publicize their products over
12 the same media, there may be a greater likelihood of confusion
13 about the source of goods than otherwise.

14 6) Actual confusion. Actual confusion is not
15 required for you to find a likelihood of confusion. However,
16 if Defendants' use of Plaintiffs' marks has led to instances of
17 actual confusion among relevant consumers, this may be a strong
18 indication that confusion is likely. Even if there are
19 instances of actual confusion, you may conclude that there is
20 no likelihood of confusion if, for example, the instances of
21 actual confusion were rare and infrequent.

22 7) Defendants' intent. In other words, Defendants'
23 good or bad faith in adopting and using their mark. Proof of
24 Defendants' intent to confuse or deceive consumers by adopting
25 and using a mark that is the same or similar to Plaintiffs'

1 mark is not necessary to establish a likelihood of confusion,
2 but is relevant to determining whether or not confusion is
3 likely. If Defendants intended to cause confusion, it may be
4 more likely that confusion will occur. Conversely, if
5 Defendants used Plaintiffs' marks in good faith and without and
6 intent to cause confusion, then likely confusion decreases.

7 That should be "an intent." I'm changing that.

8 Any objection?

9 MR. SAMMI: No objection.

10 MS. WILKINSON: No objection.

11 THE COURT:

12 8) Sophistication of buyers. More sophisticated
13 buyers, or purchasers of more sophisticated products, are
14 likely to be more careful and discriminating when purchasing
15 those products. Consequently, such purchasers may be less
16 likely to be confused by Defendants' use of Plaintiffs' marks.
17 Conversely, if the potential buyers of the products in question
18 are less sophisticated, or if the products in question are
19 commodity items, the likelihood of confusion may increase.

20 These factors are simply a guide to help you
21 determine whether confusion is likely to result from
22 simultaneous use of the Plaintiffs' and Defendants' marks. No
23 single factor or consideration is dispositive, and Plaintiffs
24 need not prove that all, or even most, of the factors are
25 present in any particular case to be successful. Nor are you

1 limited to consideration of only these factors. You must
2 consider and weigh all of the relevant evidence in determining
3 whether there is a likelihood of confusion.

4 Plaintiffs ZeniMax and id Software also bring a claim
5 for false designation against Oculus, Mr. Luckey, and Mr.
6 Iribe. Any person who makes commercial use of any word, term,
7 name, or symbol, or combination thereof that is likely to cause
8 confusion as to that person's affiliation, connection, or
9 association with another person, or that misrepresents in
10 advertising the nature, characteristics, quality, or geographic
11 origin of that person's goods or services is liable to any
12 person who is or is likely to be damaged by the false
13 designation of origin. A person may recover for false
14 designation of origin even though the person is not the owner
15 of a trademark for the word, term, name, symbol, or combination
16 used by another person.

17 2. Trademark Infringement and False Designation:
18 Defenses

19 Defendants Oculus, Mr. Luckey, and Mr. Iribe claim
20 that they are not liable for trademark infringement or false
21 designation because they had a license to use ZeniMax's
22 trademarks. A license is essentially a promise by the licensor
23 not to sue the licensee for use of the marks.

24 A license authorizing the use of trademarks can be
25 express or implied. An express license could take the form of

1 a written or oral agreement. An implied license is one which
2 may be inferred from the circumstances surrounding the use of
3 the marks and the behavior of the licensor regarding the use of
4 the marks, including for example, knowledge of the use and lack
5 of any objection to the use. The burden is on the Defendants
6 to prove the existence of a license by a preponderance of the
7 evidence. If the Defendants satisfy this burden then, in order
8 for ZeniMax to prevail, ZeniMax must prove by a preponderance
9 of the evidence that Defendants' copying was not authorized by
10 the license.

11 Defendants Oculus, Mr. Luckey, and Mr. Iribe also
12 claim that they are not liable for trademark infringement or
13 false designation because ZeniMax has acquiesced in their use
14 of any ZeniMax trademark. The acquiescence defense requires
15 Defendants to establish the following:

- 16 1) Assurance by ZeniMax, which may be express or
17 implicit, that Defendants could use the ZeniMax trademarks;
18 2) Reliance by the Defendants upon that assurance;
19 and
20 3) Undue prejudice to Defendants.

21 If you find by a preponderance of the evidence that
22 Defendants Oculus, Mr. Luckey, and/or Mr. Iribe have
23 established the above elements, your verdict must be for
24 Defendants on this claim.

25 An unlicensed owner is unduly prejudiced when the

1 user makes major business investments or expansions that depend
2 on the use of the marks; these investments and expansions would
3 suffer appreciable loss if the marks were enforced; and this
4 loss would not have been incurred had the trademark owner not
5 given assurance that the Defendants could use the mark.

6 Defendants also assert that they are not liable for
7 trademark infringement or false designation under a doctrine
8 called "nominative fair use." A defendant makes nominative
9 fair use of a mark when the defendant uses it as other than a
10 trademark, to accurately describe the Plaintiffs' goods or
11 services.

12 The Defendants have the burden of proving its
13 nominative fair use of the mark by a preponderance of the
14 evidence. Defendants make nominative fair use of trademarks
15 when they:

16 1) Use the mark in connection with the Plaintiffs'
17 product or services, which was not readily identifiable without
18 use of those marks;

19 2) Used only so much of the trademarks as was
20 reasonably necessary to identify the product or services in
21 question; and

22 3) Did not do anything that would in connection with
23 the trademarks to suggest sponsorship or endorsement of the
24 Defendants' product or service by the Plaintiffs.

25 The fact that any use by Defendants of a ZeniMax

1 trademark may bring Defendants a profit does not mean the use
2 was not a fair use.

3 Defendants Oculus, Mr. Luckey, and Mr. Iribe contend
4 that they are not liable for trademark infringement because of
5 the doctrine of laches, which we have already discussed.
6 Laches is an equitable defense with three elements: (1) delay
7 in asserting a right or claim; (2) the delay was not excusable;
8 and (3) there was undue prejudice to the party against whom the
9 claim is asserted.

10 Two kinds of prejudice may support a defense of
11 laches: (1) the delay has resulted in the loss of evidence; or
12 (2) the defendant has changed his position in a way that would
13 not have occurred if the plaintiff had not delayed. Defendants
14 have the burden of proving the laches defense by a
15 preponderance of the evidence.

16 A party asserting the defense of laches must have
17 "clean hands": That is, the party must have acted fairly and
18 without fraud or deceit as to the controversy in issue. If you
19 find that a Defendant has unclean hands, then you should not
20 find that Defendant has established the defense of laches.

21 3. Trademark Infringement and False Designation:
22 Damages.

23 If you find for Plaintiffs ZeniMax and id Software on
24 their infringement or false designation claims, you must
25 determine their damages. ZeniMax and id Software have the

1 burden of proving damages by a preponderance of the evidence.

2 In order for Plaintiffs ZeniMax and id Software to
3 recover damages on their trademark claim, Plaintiffs have the
4 burden of proving by a preponderance of the evidence that the
5 Defendants had either statutory or actual notice that the
6 Plaintiffs' trademarks were registered. Defendants have
7 statutory notice if any of the following factors are satisfied:

8 1) Plaintiffs displayed with the trademark the words
9 "Registered in U.S. Patent and Trademark Office" or,

10 2) Plaintiffs displayed with the trademark the words
11 "Reg. U.S. Pat & Tm. Off.", or

12 3) Plaintiffs displayed the trademarks with the
13 letter "R" enclosed within a circle. Display of these
14 statutory words or symbols are immaterial, or unnecessary, if
15 the Defendants had actual notice of the trademarks being
16 registered. Actual damages means the amount of money that will
17 reasonably and fairly compensate ZeniMax and id Software for
18 any injury you find was proximately caused by the Defendants'
19 infringement of Plaintiffs' registered trademarks or by
20 Defendants' false designation. Proximate cause means a cause
21 that was a substantial factor in bringing about an event, and
22 without which cause such event would not have occurred. In
23 order to be a proximate cause, the act or omission complained
24 of must be such that a person using the degree of care required
25 of him would not -- would have foreseen that the event, or some

1 similar event, might reasonably result therefrom. There may be
2 more than one proximate cause of an event.

3 You should consider whether any of the following
4 exists, and if so to what extent, in determining ZeniMax and id
5 Software's damages:

- 6 1) Any injury to their reputations;
- 7 2) Any injury to their goodwill, including any injury
8 to their general business reputations;
- 9 3) Any loss of their sales as a result of the
10 Defendants' infringement or false designation;
- 11 4) Any loss of their profits;
- 12 5) Any expense of preventing customers from being
13 deceived;
- 14 6) Any cost of future corrective advertising
15 reasonably required to correct any public confusion caused by
16 the infringement or false designation; and
- 17 7) Any other factors that bear on their actual
18 damages.

19 when considering damages, you must not
20 over-compensate. Any award should not exceed the actual damage
21 to the value of ZeniMax and id Software's marks at the time of
22 the infringement or false designation by the Defendants.
23 Plaintiffs are not entitled to recover the same damages for
24 trademark infringement and false designation – that is,
25 Plaintiffs may not recover twice for the same injury.

1 In addition to actual damages, ZeniMax is entitled to
2 any profits earned by Defendants Oculus, Mr. Luckey, and/or
3 Mr. Iribe that are attributable to the trademark infringement
4 or false designation. However, you may not include in any
5 award of profits any amount that you included in determining
6 actual damages. In assessing the Defendants' profits the
7 Plaintiffs are only required to prove the Defendants' sales.

8 I'm putting in an apostrophe after the first
9 "Defendants." It should have been there, making it possessive.

10 The Defendants must prove all costs or deductions
11 that they claim reduced their profits. An award of the
12 Defendants' profits, if any, should be attributable to the
13 unlawful use of the Plaintiffs' marks.

14 In addition, in determining whether an award of
15 profits is appropriate and the appropriate amount of an award,
16 you may consider the following factors:

17 1) whether the Defendants had the intent to confuse
18 or deceive;

19 2) whether sales have been diverted;

20 3) The adequacy of other remedies;

21 4) Unreasonable delay by ZeniMax in asserting its
22 rights;

23 5) Public interest in making the misconduct
24 unprofitable;

25 6) whether it is a case of palming off (that is, to

1 pass off one's products as products of another).

2 If you find Defendants have infringed ZeniMax and id
3 Software's trademarks or otherwise engaged in false
4 designation, you must also determine whether Defendants did so
5 intentionally and with knowledge of that infringement or false
6 designation.

7 4. Trademark Infringement and False Designation:
8 Jury Questions.

9 QUESTION 38: Did ZeniMax prove, by a preponderance
10 of the evidence, that Defendants Brendan Iribe, Palmer Luckey,
11 and/or Oculus infringed any of ZeniMax's trademarks?

12 Answer "Yes" or "No" for each Defendant:

13 Oculus: _____

14 Palmer Luckey: _____

15 Brendan Iribe: _____

16 QUESTION 39: If you answered "Yes" to any part of
17 Question 38, answer this question for each Defendant which you
18 answered "Yes" in Question 38. Otherwise, do not answer this
19 question and skip to Question 43.

20 Do you find that any of the defenses of license,
21 acquiescence, or nominal fair use bars ZeniMax's claim for
22 trademark infringement?

23 Answer "Yes" or "No" for each Defendant:

24 Oculus: _____

25 Palmer Luckey: _____

1 Brendan Iribe: _____

2 QUESTION 40: If you answered "Yes" to any part of
3 Question 38, answer this question for each Defendant which you
4 answered "Yes" in Question 38. Otherwise, do not answer this
5 question and skip to Question 43.

6 Do you find that the doctrine of laches bars ZeniMax
7 and id Software's claim for trademark infringement?

8 Answer "Yes" or "No" for each Defendant:

9 oculus: _____

10 Palmer Luckey: _____

11 Brendan Iribe: _____

12 QUESTION 41: Answer this question for each Defendant
13 for which you answered "Yes" to Question 38 and "No" to both
14 Question 39 and Question 40. Otherwise, do not answer this
15 question and skip to Question 43.

16 1. What amount of actual damages, if any, did
17 ZeniMax and id Software suffer as a result of all trademark
18 infringement by each of the Defendants?

19 Answer in dollars and cents, if any.

20 oculus: \$ _____

21 Palmer Luckey: \$ _____

22 Brendan Iribe: \$ _____

23 2. What amount of the Defendants' profits that were
24 not taken into account in computing any of ZeniMax and id
25 Software's damages, if any, do you find that should be awarded

1 against each Defendant and to the Plaintiffs for each
2 Defendants' trademark infringement?

3 Answer in dollars and cents, if any.

4 Oculus: \$ _____

5 Palmer Luckey: \$ _____

6 Brendan Iribe: \$ _____

7 QUESTION 42: Answer this question for each Defendant
8 for which you answered "Yes" to Question 38.

9 Did any Defendant intentionally and knowingly
10 infringe ZeniMax and id Software's rights in their trademarks:

11 Answer "Yes" or "No" for each Defendant:

12 Oculus: _____

13 Palmer Luckey: _____

14 Brendan Iribe: _____

15 QUESTION 43: Did ZeniMax prove, by a preponderance
16 of the evidence, that Defendants Brendan Iribe, Palmer Luckey,
17 and/or Oculus are liable for false designation?

18 Answer "Yes" or "No" for each Defendant:

19 Oculus: _____

20 Palmer Luckey: _____

21 Brendan Iribe: _____

22 QUESTION 44: If you answered "Yes" to any part of
23 Question 43, answer this question for each Defendant which you
24 answered "Yes" in Question 43. Otherwise, do not answer this
25 question and skip to Question 48. Do you find that any of the

1 defenses of license, acquiescence, or nominal fair use bars
2 ZeniMax's claim for false designation?

3 Answer "Yes" or "No" for each Defendant:

4 Oculus: _____

5 Palmer Luckey: _____

6 Brendan Iribe: _____

7 QUESTION 45: If you answered "Yes" to any part of
8 Question 43, answer this question for each Defendant which you
9 answered "Yes" in Question 43. Otherwise, do not answer this
10 question and skip to Question 48. Do you find that the
11 doctrine of laches bars ZeniMax and id Software's claim for
12 false designation?

13 Answer "Yes" or "No" for each Defendant:

14 Oculus: _____

15 Palmer Luckey: _____

16 Brendan Iribe: _____

17 QUESTION 46: Answer this question for each Defendant
18 for which you answered "Yes" to Question 43 and "No" to both
19 Question 44 and Question 45. Otherwise, do not answer this
20 question and skip to Question 48.

21 1. What amount of actual damages, if any, did
22 ZeniMax and id Software suffer as a result of false designation
23 by each of the Defendants?

24 Answer in dollar and cents, if any.

25 Oculus: \$ _____

1 Palmer Luckey: \$ _____

2 Brendan Iribe: \$ _____

3 2. What amount of the Defendants' profits that were
4 not taken into account in computing any of ZeniMax and id
5 Software's damages, if any, do you find that should be awarded
6 against each Defendant and to the Plaintiffs for each
7 Defendants' false designation?

8 Answer in dollar and cents, if any.

9 Oculus: \$ _____

10 Palmer Luckey: \$ _____

11 Brendan Iribe: \$ _____

12 QUESTION 47: Answer this question for each Defendant
13 for which you answered "Yes" to Question 43. Otherwise, do not
14 answer this question and skip to Question 48.

15 Did any Defendant intentionally and knowingly engaged
16 in the false designation?

17 Answer "Yes" or "No" for each Defendant:

18 Oculus: _____

19 Palmer Luckey: _____

20 Brendan Iribe: _____

21 H. Exemplary Damages

22 1. Exemplary Damages: Standards

23 ZeniMax and id Software have also made a claim for
24 exemplary damages in connection with their claims for
25 misappropriation of trade secrets, tortious interference with

1 contract, and unfair competition.

2 The purpose of exemplary damages is to punish and
3 deter, not to compensate. Exemplary damages serve to punish a
4 defendant and by doing so, to deter others from engaging in
5 similar conduct in the future. You are not required to award
6 exemplary damages. If you decide to award exemplary damages,
7 you must use sound reason in setting the amount. Your award of
8 exemplary damages must not reflect bias, prejudice, or sympathy
9 toward any party. It should be presumed that the Plaintiffs
10 have been made whole by compensatory damages, so exemplary
11 damages should be awarded only if a Defendant's misconduct is
12 so reprehensible as to warrant imposition of further sanctions
13 to achieve punishment or deterrence.

14 You may also impose exemplary damages against one or
15 more of Defendants and not others. You may also award
16 different amounts against different Defendants. Exemplary
17 damages may be awarded only if you are unanimous in regard to
18 finding liability for and the amount of exemplary damages. You
19 are instructed that, in order for you to find exemplary
20 damages, your answer to the question regarding the amount of
21 damages must be unanimous.

22 "Exemplary damages" means an amount that you may in
23 your discretion award as a penalty or by way of punishment.

24 If you find in favor of ZeniMax and id Software one
25 of these claims, and you find by clear and convincing evidence

1 that the harm to ZeniMax and id Software associated with one of
2 these claims resulted from malice, fraud, or gross negligence,
3 you may assess against Defendants and award to ZeniMax and
4 id Software exemplary damages for Defendants' conduct in
5 connection with those claims.

6 "Clear and convincing evidence" means the measure or
7 degree of proof that produces a firm belief or conviction of
8 the truth of the allegations sought to be established. This
9 involves a greater degree of persuasion than is necessary to
10 meet the "preponderance of the evidence" standard I provided to
11 you earlier.

12 "Malice" means a specific intent by Defendants to
13 cause substantial injury or harm to ZeniMax and id Software.

14 "Fraud" occurs when (a) a party makes a material
15 misrepresentation, and (b) the misrepresentation is made with
16 knowledge of its falsity or made recklessly without any
17 knowledge of the truth and as a positive assertion, and (c) the
18 misrepresentation is made with the intention that it should be
19 acted on by the other party, and (d) the other party relies on
20 the misrepresentation and thereby suffers injury.

21 "Misrepresentation" means a false statement of fact.

22 Fraud also occurs when (a) a party fails to disclose
23 a material fact within the knowledge of that party, and (b) the
24 party knows that the other party is ignorant of the fact and
25 does not have an equal opportunity to discover the truth, and

1 (c) the party intends to induce the other party to take some
2 action by failing to disclose the fact, and (d) the other party
3 suffers injury as a result of acting without knowledge of the
4 undisclosed fact.

5 "Gross negligence" means an act or omission by
6 Defendants, which (a) when viewed objectively from the
7 standpoint of Defendants at the time of its occurrence involves
8 an extreme degree of risk, considering the probability and
9 magnitude of the potential harm to others; and (b) of which
10 Defendants have actual, subjective awareness of the risk
11 involved, but nevertheless proceed with conscious indifference
12 to the rights, safety, or welfare of others.

13 Factors you shall consider in awarding exemplary
14 damages, if any, are:

15 (A) The nature of the wrong.

16 (B) The character of the conduct involved.

17 (C) The degree of culpability of Defendant.

18 (D) The situation and sensibilities of the parties
19 concerned.

20 (E) The extent to which such conduct offends a public
21 sense of justice and propriety.

22 (F) The net worth of Defendant.

23 You may also find that a corporation, here Oculus and
24 Facebook, are liable for exemplary damages because of the acts
25 of their agents, if:

1 (A) Oculus or Facebook authorized the doing and the
2 manner of the act; or

3 (B) The agent was unfit and Oculus or Facebook was
4 reckless in employing him; or

5 (C) The agent was employed in a managerial capacity
6 and was acting in the scope of his employment; or

7 (D) Oculus or Facebook or another manager of Oculus
8 or Facebook ratified or approved the agent's act.

9 2. Exemplary Damages: Jury Questions

10 QUESTION 48:

11 Answer this question for each Defendant for which you
12 answered "Yes" in Question 1 and for which you also answered
13 "No" in Question 2, Question 3, and Question 4. Otherwise, do
14 not answer this question and skip to Question 50.

15 Do you find by clear and convincing evidence that the
16 harm to ZeniMax and id Software resulting from that
17 misappropriation resulted from malice, fraud, or gross
18 negligence?

19 Answer "Yes" or "No" for each Defendant:

20 oculus: _____

21 Facebook: _____

22 Palmer Luckey: _____

23 Brendan Iribe: _____

24 John Carmack: _____

25 QUESTION 49:

1 If you answered Yes to Question 48 for any Defendant,
2 then answer this question for those Defendants for which you
3 answered "Yes" in Question 48. Otherwise, do not answer this
4 question and skip to Question 50.

5 what sum of money, if any paid now in cash, should be
6 assessed against any Defendant and awarded to ZeniMax and
7 id Software as exemplary damages, if any, for the conduct found
8 in response to Question 48?

9 Answer in dollars and cents, if any.

10 Oculus: \$ _____

11 Facebook: \$ _____

12 Palmer Luckey: \$ _____

13 Brendan Iribe: \$ _____

14 John Carmack: \$ _____

15 QUESTION 50:

16 Answer this question if you answered "Yes" to
17 Question 28 and "No" to Question 29. Otherwise do not answer
18 this question and skip to Question 52.

19 Do you find by clear and convincing evidence that the
20 harm to ZeniMax and id Software resulting from that tortious
21 interference resulted from malice, fraud, or gross negligence?

22 Answer "Yes" or "No." _____

23 QUESTION 51:

24 Answer this question if you answered "Yes" to
25 Question 50. Otherwise, do not answer this question and skip

1 to Question 52.

2 what sum of money, if any paid now in cash, should be
3 assessed against Facebook and awarded to ZeniMax and
4 id Software as exemplary damages, if any, for the conduct found
5 in response to Question 50?

6 Answer in dollars and cents, if any.

7 Answer: \$ _____

8 QUESTION 52:

9 Answer this question for each Defendant that you
10 answered "Yes" to Question 31 and also answered "No" to
11 Question 32 for that Defendant. Otherwise, do not answer this
12 question and skip to Question 54.

13 Do you find by clear and convincing evidence that the
14 harm to ZeniMax and id Software resulting from that unfair
15 competition resulted from malice, fraud, or gross negligence?

16 Answer "Yes" or "No" for each Defendant:

17 Facebook: _____

18 oculus: _____

19 QUESTION 53:

20 Answer this question for each Defendant that you
21 answered "Yes" in Question 52. Otherwise, do not answer this
22 question and skip to Question 54.

23 what sum of money, if any paid now in cash, should be
24 assessed against Facebook and/or Oculus and awarded to ZeniMax
25 and id Software as exemplary damages, if any, for the conduct

1 found in response to Question 52.

2 Answer in dollars and cents, if any.

3 Facebook: \$ _____

4 Oculus: \$ _____

5 I. John Carmack's Breach of Contract Claim

6 1. Breach of Contract: Liability

7 Mr. Carmack also alleges that ZeniMax is liable to
8 him for breach of his 2009 employment contract with ZeniMax.
9 Specifically, Mr. Carmack alleges that ZeniMax breached section
10 4 and section 16.4(b) of the contract.

11 To succeed on his breach of contract claim,
12 Mr. Carmack must prove the following things by a preponderance
13 of the evidence:

14 1. The existence of a valid, enforceable contract
15 between Mr. Carmack and ZeniMax;

16 2. Mr. Carmack performed his obligations under that
17 contract;

18 3. ZeniMax breached that contract; and

19 4. Mr. Carmack sustained damages as a result of that
20 breach.

21 2. Breach of Contract: Defenses

22 ZeniMax asserts as a defense that they were excused
23 from technical compliance with the employment agreement because
24 Mr. Carmack waived his rights under the employment agreement.

25 waiver is an intentional surrender of a known right

1 or intentional conduct inconsistent with claiming the right.
2 If you find by a preponderance of the evidence that Mr. Carmack
3 intentionally surrendered his rights under the employment
4 agreement or intentionally conducted himself in ways that were
5 inconsistent with claiming the rights that Mr. Carmack asserts
6 he held under the employment agreement, then your verdict
7 should be for ZeniMax on this claim.

8 ZeniMax asserts that the defense of laches bars
9 Mr. Carmack's breach of contract claim. Laches is an equitable
10 defense with three elements: (1) delay in asserting a right or
11 claim; (2) the delay was not excusable; and (3) there was undue
12 prejudice to the party against whom the claim is asserted.

13 Two kinds of prejudice may support a defense of
14 laches: (1) the delay has resulted in the loss of evidence; or
15 (2) ZeniMax has changed its position in a way that would not
16 have occurred if Mr. Carmack had not delayed.

17 THE COURT: Take out the word "the."

18 Any objection?

19 MR. STOJILKOVIC: No objection.

20 MR. SAMMI: No objection.

21 ZeniMax has the burden of proving the laches defense
22 by a preponderance of the evidence.

23 A party asserting the defense of laches must have
24 "clean hands": that is, the party must have acted fairly and
25 without fraud or deceit as to the controversy in issue. If you

1 find that ZeniMax has unclean hands, then you should not find
2 that ZeniMax has established the defense of laches.

3 ZeniMax also asserts that Mr. Carmack failed to
4 comply with a material term of the employment agreement such
5 that ZeniMax's failure to perform under that agreement, if any,
6 was excused. Failure to comply by ZeniMax is excused by
7 Mr. Carmack's previous failure to comply with a material
8 obligation of the employment agreement. To determine the
9 materiality of a breach, you may consider the following:

10 (1) The extent to which the injured party will obtain
11 the substantial benefit which he could have reasonably
12 anticipated;

13 (2) The extent to which the injured party may be
14 adequately compensated in damages for lack of complete
15 performance;

16 (3) The extent to which the party failing to perform
17 has already partly performed or made preparations for
18 performance;

19 (4) The greater or lesser hardship on the party
20 failing to perform in terminating the contract;

21 (5) The willful, negligent, or innocent behavior of
22 the party failing to perform; and

23 (6) The greater or lesser uncertainty that the party
24 failing to perform will perform the remainder of the contract.

25 3. Breach of Contract: Damages

1 Should you find that Mr. Carmack has proven his
2 breach of contract claim, you must compensate him with a sum of
3 money, if paid now in cash, that would fairly and reasonably
4 compensate Mr. Carmack for his damages that were proximately
5 caused by the ZeniMax's breach of the employment it had with
6 Mr. Carmack --

7 Take "the" out again. Okay.

8 Any objection?

9 MR. STOJILKOVIC: No objection.

10 MR. SAMMI: No objection.

11 THE COURT: If you award contract damages, those
12 damages should be measured at the time of the breach and not at
13 the time of the trial.

14 Proximate cause means a cause that was a substantial
15 factor in bringing about an event, and without which cause such
16 event would not have occurred. In order to be a proximate
17 cause, the act or omission complained of must be such that a
18 person using the degree of care required of him would have
19 foreseen that the event, or some similar event, might
20 reasonably result therefrom. There may be more than one
21 proximate cause of an event.

22 You should not interpret the fact that I am giving
23 instructions about damages as an indication in any way that I
24 believe Mr. Carmack should, or should not, prevail on this
25 claim. It is your task to decide whether ZeniMax is liable. I

1 am instructing you on damages only so that you will have
2 guidance in the event you decide that ZeniMax is liable and
3 that Mr. Carmack is entitled to recover money.

4 If you decide so, Mr. Carmack is entitled to recover
5 his direct damages, which are those damages which naturally and
6 necessarily flow from the breach, if any, and consequential
7 damages, which are those damages that are the natural,
8 probable, and foreseeable consequence of the breach, if any.

9 4. Breach of Contract: Jury Questions

10 QUESTION 54:

11 Did ZeniMax fail to comply with its employment
12 agreement with John Carmack?

13 Answer "Yes" or "No": _____

14 QUESTION 55:

15 Answer this question if you answered "Yes" to
16 Question 54. Otherwise, do not answer anymore questions,
17 including this one.

18 Do you find that the doctrine of waiver bars John
19 Carmack's breach of contract claim against ZeniMax?

20 Answer "Yes" or "No": _____

21 QUESTION 56:

22 Do you find that the doctrine of laches bars John
23 Carmack's breach of contract claim against ZeniMax?

24 Answer "Yes" or "No": _____

25 QUESTION 57:

1 was ZeniMax's failure to comply excused?

2 Answer "Yes" or "No: _____

3 QUESTION 58:

4 Answer this question if you answered "Yes" to
5 Question 54 and "No" to Questions 55, 56, and 57. Otherwise,
6 do not answer anymore questions, including this one.

7 what sum of money, if any, if paid now in cash, would
8 fairly and reasonably compensate John Carmack for his damages,
9 if any, that resulted from ZeniMax's failure to comply with the
10 employment agreement?

11 Do not add any amount for interest on damages, if
12 any.

13 Answer in dollars and cents.

14 \$ _____

15 I will read some more instructions to you, but only
16 three pages, after you hear final argument.

17 First you're going to have lunch, then you're going
18 to hear final arguments, and then I will read those other
19 instructions. But not now. Do not begin your deliberations
20 now.

21 So just go back and have lunch.

22 Don't talk about the case.

23 Thank you very much.

24 Be back in an hour.

25 SECURITY OFFICER: All rise.

1 (Jury out)

2 THE COURT: Y'all have anything?

3 MR. SAMMI: That was impressive, sir.

4 MS. WILKINSON: That was a marathon, yeah.

5 MR. SAMMI: That was impressive.

6 THE COURT: That's all right. Are y'all ready after
7 this?

8 MR. SAMMI: Yeah.

9 THE COURT: Eat real fast. Do whatever you need to
10 do.

11 MS. WILKINSON: When do you want us back, Judge?

12 THE COURT: In one hour. We really will start in one
13 hour. I may not start in an hour, but y'all will.

14 (Recess at 12:41)

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1 I, TODD ANDERSON, United States Court Reporter for the
2 United States District Court in and for the Northern District
3 of Texas, Dallas Division, hereby certify that the above and
4 foregoing contains a true and correct transcription of the
5 proceedings in the above entitled and numbered cause.

6 WITNESS MY HAND on this 26th day of January, 2017.

7
8
9 /s/Todd Anderson

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